Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has repeatedly held that the Commerce and Due Process Clauses of the federal Constitution preclude States from regulating activities beyond their borders. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court also held that due process prohibits a court from applying in a class action the law of a single State that lacks significant contact with the claims of each individual class member. In this case, the Supreme Court of Oklahoma ruled that—in order to facilitate the certification of a nationwide class—Michigan law, the law of the defendant's principal place of business, should apply to the state-law claims of any plaintiff who bought or possessed one of the defendant's minivans *anywhere* in the United States. The questions presented are:

1. Is the lower court's application of a special choice-of-law analysis, applicable only to class actions, to facilitate certification of a nationwide class inconsistent with the Due Process or Commerce Clause of the federal Constitution?

2. Is the lower court's application of a single State's law to the claims of all class members nationwide inconsistent with the Due Process or Commerce Clause of the federal Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner DaimlerChrysler Corporation was formerly Chrysler Corporation, which was also named as a party in the courts below.

The membership of the class certified by the trial court, of which the named respondents are members, is defined in the Appendix, *infra*, at 40a-41a.

RULE 29.6 STATEMENT

Petitioner is a wholly owned subsidiary of DaimlerChrysler Motors Company LLC, which is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, which is a wholly owned subsidiary of DaimlerChrysler AG, a publicly traded company organized under the laws of the Federal Republic of Germany.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DaimlerChrysler Corporation ("DCC") respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Oklahoma in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma (App., *infra*, 1a-20a) is reported at 81 P.3d 618 (Okla. 2003). The opinion and order of the District Court in and for Sequoyah County, Oklahoma, granting respondents' motion for class certification (App., *infra*, 21a-42a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on February 25, 2003. DCC filed a timely petition for rehearing, which the Supreme Court of Oklahoma denied on November 6, 2003. App., *infra*, 43a. On January 26, 2004, Justice Breyer extended the time for filing a petition for a writ of certiorari to and including March 26, 2004. App. No. 03A624. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the federal Constitution are set out in the Appendix, *infra*, at 45a-46a.

STATEMENT OF THE CASE

The fifty States have decided to adopt widely divergent limitations on actions for breach of warranty. The issue raised in this case is whether a single State can use its choice-of-law rules to circumvent those limitations. With the express purpose of allowing certification of a nationwide plaintiff class, the Oklahoma Supreme Court ordered the application of the law of Michigan to every one of the millions of warranty claims at issue, including the claims of the vast ma-

jority of class members who have essentially no contact with either Oklahoma or Michigan. In doing so, the court below refused to consider which State had the greatest connection to or interest in any individual plaintiff's claim, and essentially acknowledged that the outcome of the choice-of-law analysis would differ if conducted on an individualized basis rather than *en masse*. Moreover, the warranty claims that the lower courts certified are unrecognized by—indeed, contrary to—the laws of many States, laws that under a conventional choice-of-law analysis would govern the claims of a large segment of the certified class had those plaintiffs sued individually rather than collectively.

1. This litigation involves allegedly defective airbags in minivans. Airbags deploy rapidly when sensors detect an impact with the vehicle; the plaintiffs in this case allege that the passenger-side airbags installed in certain DCC minivans can deploy too forcefully. The National Highway Traffic Safety Administration had previously rejected an identical claim relating to the same passenger vehicles, concluding that there was no evidence of a defect that would warrant a recall. *See* Denial of Motor Vehicle Defect Petition, 62 Fed. Reg. 41,477, 41,478 (Aug. 1, 1997). A number of plaintiffs continued to press the theory that the airbags were defective, bringing claims against DCC and other manufacturers under Louisiana and Texas law, including Texas's version of the Uniform Commercial Code. The federal district court in which these claims were consolidated rejected the claims on their merits. *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 799, 802-04 (E.D. La. 1998).

2. This lawsuit was brought in state court in Sequoyah County, Oklahoma, as a putative nationwide class action, with respondents Ysbrand and Cooney as the named class members. Only Ysbrand is an Oklahoma resident; Cooney resides in Delaware, DCC's state of incorporation. App., *infra*, 48a. Respondents' complaint alleged that the airbags in

respondents' minivans were defective because they *might* deploy forcefully and cause injury. Respondents did not allege *actual* physical injury and, indeed, excluded from the definition of the proposed class anyone who had been injured by an air bag deployment. *Id.* at 50a, 63a-64a.

The complaint asserted four claims, none specifically based on the law of any individual State (although the plaintiffs specifically noted duties allegedly owed under Oklahoma and Delaware law, App., *infra*, 58a). Counts alleging "breach of express warranty," "breach of implied warranty of merchantability," and "breach of implied warranty of fitness" relied on provisions of the Uniform Commercial Code (UCC)—which is not itself law, except insofar as States adopt it. *Id.* at 60a-62a. The fourth count asserted a claim for common-law "fraud and deceit." *Id.* at 62a-63a.

The state trial court issued an order inviting the plaintiffs to move for certification of a nationwide class, which they did. DCC opposed the motion on federal-law grounds, asserting, *inter alia*, that the laws of different States must be applied to the various class members' claims. *See* App., *infra*, 69a-73a; *see also id.* at 75a. After briefing, the trial court entered an order drafted by the plaintiffs (*id.* at 19a-20a), which certified a nationwide class comprising all current owners of several models of minivans but excluding anyone injured by his airbag. *Id.* at 40a-41a.[1] The class includes in excess of one million potential claimants. *See id.* at 27a.

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[1] The class definition included:

> [a]ll entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia, who purchased and who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one (1) model year 1996-1997 "minivan" automobile marketed by defendant as Chrysler

The trial court's opinion relied on the subsequently reversed decision of the Southern District of Indiana in *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001), *rev'd*, 288 F.3d 1012 (7th Cir. 2002), for the proposition that choice-of-law issues need not impede class certification. App., *infra*, 36a. Save for this citation of a now-reversed decision discussing Indiana choice-of-law rules, the trial court's opinion contained no choice-of-law analysis at all and did not identify which State's law it intended to apply. The opinion concluded only that "the alleged choice of law problems identified by the defendants does [*sic*] not bar certification." *Id.*

3. DCC appealed the class certification to the Oklahoma Supreme Court, which by a 6-3 vote affirmed the certification of a nationwide class as to the warranty claims, but reversed as to the fraud claim.[2] The court concluded that under Oklahoma choice-of-law principles, the law of each plaintiff's home State would apply to the fraud claim. Applying the laws of all 50 States would "present[] an overwhelming burden which would make the class unmanageable and a class action determination of that claim inappropriate."

> Town & Country or Chrysler Minivan or Plymouth Voyager or Plymouth Grand Voyager or Dodge Caravan, which was manufactured by defendant for sale in any of the fifty states of the United States of America or the District of Columbia, or which defendant marketed in any of the fifty states of the United States of America or the District of Columbia as a product of its own manufacture, . . . which contains on the driver side and/or passenger side of the forward seating area a passive restraint system commonly known as an "air bag" . . . .

App., *infra*, 40a-41a.

[2] DCC raised federal-law issues in its initial statement of issues on appeal and again throughout its appellate briefing. *E.g.*, App., *infra*, 88a-89a, 96a, 99a-100a, 111a n.18.

App., *infra*, 16a. The court accordingly held that certifying the fraud claims was an abuse of discretion. *See id.* However, the court reached a different conclusion as to the warranty claims.

The court accepted respondents' contention, raised for the first time in their appellate briefing, that the trial court had intended to create a manageable class, in which common issues of law predominate, by applying *Michigan* law to the warranty claims of every single plaintiff in the nationwide class. The state Supreme Court discerned this intent from the trial court's citation of *Bridgestone/Firestone*. App., *infra*, 10a-11a. The court conceded in a footnote that that decision's choice-of-law analysis had been reversed by the Seventh Circuit, but asserted that the classwide application of Michigan law—without any individualized analysis—was nonetheless permissible in a state that, like Oklahoma, applies the "most significant relationship" test to determine the law governing a contract claim. *Id.* at 11a n.4.

Reviewing the trial court's implicit holding, the court proceeded to apply the "most significant relationship" test, but did so on a classwide rather than individual basis. Although the court conceded that the home State of each individual plaintiff had a "significant" interest in applying its own law to the claims of its citizens, or to transactions conducted within its borders, the court stated that no one plaintiff's home State had a more significant interest than any other in applying its law to the claims of the entire *class*. App., *infra*, 13a ("[T]he relative interest of each buyer's home state in applying its version of the UCC is more or less equal."). Michigan, the State in which DCC maintains its principal place of business, was "the only state where conduct relevant to all class members occurred." *Id.* Citing factors from the *Restatement (Second) of Conflict of Laws*, the court stated that "[t]he needs of the interstate system and the basic policies of predictability and uniformity of result re-

quire that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions." *Id.* The court concluded, "Michigan law applies." *Id.* at 13a-14a.

In reaching that conclusion, the court rejected DCC's argument that the Constitution precluded applying the law of a single State—whether Oklahoma, Michigan, or any other—without conducting an individualized choice-of-law analysis to verify that the State in question has sufficient contact with each plaintiff's claim to justify imposing its regulatory regime on the parties. The court stated that its application of Michigan law was "consistent with the constitutional imperative that 'for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" App., *infra*, 14a (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), and *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

Having determined that Michigan law applied to the warranty claims, the state Supreme Court affirmed the trial court's certification of a nationwide class with respect to those claims. The court found that common questions of law predominated, in light of its conclusion that Michigan law governed the claims of every member of the plaintiff class. The other requirements of Oklahoma's class-certification rule (which mirrors Rule 23 of the Federal Rules of Civil Procedure) were satisfied with respect to the warranty claims, the court believed, leaving the decision to certify the class within the trial court's discretion. App., *infra*, 17a-20a.

Chief Justice Watt and Justices Hargrave and Winchester each registered full or partial dissent from the majority opinion. None filed a separate opinion. App., *infra*, 20a.

DCC sought rehearing, supported by the State of Michigan and numerous other *amici*. Michigan's brief pointed out

that applying the plaintiffs' novel theory of Michigan products-liability law to the entire nationwide class violated basic constitutional principles of federalism and State sovereignty and *undermined* the same Michigan interests that the Oklahoma court had purported to protect. The Supreme Court of Oklahoma denied rehearing by a 5-4 vote, with Justice Kauger—who had previously joined the majority opinion—voting with the dissenters. App., *infra*, 43a. The state court has stayed the effectiveness of its mandate pending this Court's disposition of the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The decision below creates a true Frankenstein monster of mismatched parts: Michigan law, Oklahoma forum, nationwide adjudication.[3] The Supreme Court of Oklahoma sanctioned an application of choice-of-law principles that, applied to an individual plaintiff, plainly would be constitutionally inadequate. But the protections of the Due Process and Commerce Clauses are no weaker in the context of a class action. In addition, Oklahoma's use of a nationwide class to override the conflicting warranty laws of other jurisdictions violates the Due Process and Commerce Clauses' restrictions on individual States' ability to extend their regulatory reach beyond their own borders.

Notwithstanding this Court's prior guidance, state courts are increasingly receptive to the argument that Due Process and Commerce Clause protections should be diluted when needed to expedite classwide adjudication. These courts are becoming the forum of choice for counsel representing nationwide plaintiff classes, and their choice-of-law decisions are becoming a means of overriding the regulatory decisions

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[3] *Cf.* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

of their sister States. This Court should grant review to provide much-needed guidance to courts considering requests to certify multistate plaintiff classes in actions premised on state law, an increasingly common phenomenon.

I. The Oklahoma Court's Classwide Analysis Conflicts With Decisions Holding That Due Process Requires A Choice-Of-Law Analysis Specific To Each Plaintiff

This Court has consistently held that plaintiffs in both individual and class actions do not enjoy an unfettered right to select the substantive law that governs their claims. Choice-of-law principles may not direct the application of a State's body of law to a plaintiff's claim if the State has little or no connection with the underlying conduct: the Due Process Clause precludes such an unforeseeable and unfair result. Lower federal and state courts have interpreted this Court's cases to require, in the context of a putative nationwide class action, that choice-of-law principles be applied to each potential plaintiff, not to the litigation as a whole with the goal of certifying a class. The decision below contravenes these decisions and threatens to draw in litigants seeking a jurisdiction friendly to classwide adjudication.

A. This Court's Decisions Preclude Applying A State's Law To Transactions In Which It Has No Significant Regulatory Interest

The Due Process Clause places a substantive limitation on choice-of-law determinations: although the forum State has some freedom to select among the applicable rules of decision, the selection must be made from among bodies of law to which the parties may constitutionally be subjected. This constitutional requirement cannot be subordinated to the state forum's desire to apply its lenient class-certification rules. The Oklahoma Supreme Court thus erred by applying a different choice-of-law rule expressly to make a nationwide class possible.

1. The starting point for analyzing constitutional limits on choice-of-law rules in class actions is this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which the court below cited but ignored. In *Shutts* this Court considered the claims of a multistate class of plaintiffs who brought suit in Kansas state court against an out-of-state corporation. The state courts agreed with plaintiffs that Kansas law should govern the claims of the entire class, citing the plaintiffs' choice of Kansas as the forum and that State's preference for applying its own law in its own courts absent exceptional circumstances. *Id.* at 803.

This Court reversed, holding that Kansas could not constitutionally apply its own law to the claims of the entire class. Even though Kansas had personal jurisdiction over both the defendant (through its conduct of business in that State) and the plaintiff class members (through their named representatives), these contacts were insufficient to justify applying Kansas law to the dispute, which involved a set of oil and gas leaseholds located in other States. 472 U.S. at 819-20. Moreover, the choice of law was anything but academic: choosing one of the other potentially applicable rules of decision would change the outcome. Because there was a material conflict between the substantive law of Kansas and that of Texas and Oklahoma (the other possible sources of law), the due process rights of the parties were violated by imposing Kansas law upon them. *Id.* at 817-18.

This Court specifically *rejected* the notion that these limitations should be relaxed in order to give effect to the class action as a favored form of adjudication. Rather, these constitutional principles must be applied to the claims of *each* class member: the State whose law is applied "must have a 'significant contact or significant aggregation of contacts' to the claims asserted *by each member of the plaintiff class*, contacts 'creating state interests,' in order to ensure that the choice of [that] law is not arbitrary or unfair." 472

U.S. at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)) (emphasis added). If the claims of some class members are based on "a transaction with little or no relationship to the forum," the forum State may not apply its own law solely to homogenize the plaintiffs' claims artificially and make them suitable for class-action adjudication. *Id.* at 821. The class action, the Court stressed, is nothing more than a procedural device; the Constitution's substantive restrictions on a State's power to apply its own law beyond its borders are "not altered by the fact that it may be more difficult or more burdensome to comply . . . because of the large number of transactions which the State proposes to adjudicate" in a single action. *Id.*

The Court in *Shutts* also stressed the general principle that even a *named* plaintiff's choice of the forum is not controlling as to choice of law. 472 U.S. at 820 (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936), and *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930)). Simply because the plaintiff chooses a court into which the defendant may be haled does not mean that the plaintiff may also choose his preferred body of *law* without limitation: "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." *Id.* (quoting *Allstate*, 449 U.S. at 337 (Powell, J., dissenting)) (internal quotation marks omitted; alteration in original). Due process does not permit a state court to subject a party to a body of substantive law that is so contrary to its expectations as to be "arbitrary and unfair." *Id.* at 822. That constitutional limitation precluded applying Kansas law to transactions involving property outside Kansas, an out-of-state defendant, and, for the most part, non-Kansas plaintiffs.

2. *Shutts* makes clear that the Supreme Court of Oklahoma erred by certifying a nationwide class according to an Oklahoma choice-of-law principle favoring classwide adju-

dication. The state court failed altogether to examine whether *either* Oklahoma *or* Michigan had a sufficient nexus with "each member of the plaintiff class," *Shutts*, 472 U.S. at 821, to justify applying its law on an *individual* basis. Rather, the state court committed precisely the error that *Shutts* condemns: forsaking individualized assessment of contacts for the sake of classwide adjudication.

The Oklahoma court's selection of Michigan law to govern the claims of every minivan-owning plaintiff in the country, contrary to customary choice-of-law principles and DCC's reasonable expectations, gives rise to exactly the sort of unfair arbitrariness that *Shutts* forbids. As even the state Supreme Court conceded, applying ordinary choice-of-law principles to a warranty claim results in selecting the law of the place of *delivery*, which for nearly every member of the plaintiff class would mean the law of her home State—*not* the law of Michigan. *See* App., *infra*, 13a ("'[I]n a contract for a sale of goods the most significant contact is the place of delivery unless another state has a more significant relationship.'" (quoting *Collins Radio Co. of Dallas, Tex. v. Bell*, 623 P.2d 1039, 1047 (Okla. Ct. App. 1980)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 & cmts. e, f. Thus, had respondent Cooney, a Delaware resident, filed this lawsuit in Sequoyah County as an individual rather than a class representative, the Oklahoma courts never would have selected Michigan law to govern her claim. As the state Supreme Court recognized, every State retains a significant interest in applying its own warranty law to products sold within its borders. App., *infra*, 13a. That interest cannot be trumped by the desire of two named plaintiffs to invoke the procedural rules of the courts of Sequoyah County.

3. Although conducting the choice-of-law analysis on a classwide basis would conflict squarely with this Court's holding in *Shutts* irrespective of what body of law the state court ultimately selected, the application of Michigan law to

respondents' claims also contravenes other decisions of this Court. For example, in *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), this Court held that Texas could not constitutionally apply its own law to a Texas resident's contract claim that arose entirely outside Texas. *See id.* at 404, 407-10. Texas law, if applied, would have modified the insurance contract, "abrogat[ing] a contractual right and impos[ing] liability [where] the parties ha[d] agreed that there should be none." *Id.* at 406-07. Although the plaintiff suing on the contract was a permanent resident of Texas, "nothing in any way relating to the policy sued on . . . was ever done or required to be done in Texas." *Id.* at 408. This Court accordingly held that applying Texas law would violate the defendant's due process rights. *See also, e.g.*, *Allstate*, 449 U.S. at 310-11 (plurality opinion) (*Dick* stands "for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional"); *id.* at 333 n.1 (Powell, J., dissenting) (*Dick* "is a case where the reasonable expectations of a litigant were frustrated" by the state court's application of a different body of law).

Dick makes clear that even in an *individual* action, the Constitution restricts courts from applying the substantive law of a State that lacks sufficient connection to the subject matter of the litigation. (*Dick* applied the Due Process Clause, but the same result would follow *a fortiori* under the Commerce Clause's restrictions on extraterritorial regulation. *See infra* Section II; *cf. Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983).) The residence of one of the parties is insufficient, standing alone, when the litigation turns on actions that that party performed elsewhere—as in this case, in which plaintiffs' contract-based theory turns on the alleged breach of express and implied warranties that supposedly attended DCC's *nationwide* sale of minivans. Thus, had respondent Cooney, the Delawarean, sued *individually* in Sequoyah County, the Due Process Clause (and,

as noted above, Oklahoma's choice-of-law rules) would have precluded her from demanding the application of Michigan warranty law. Indeed, a contrary holding would have allowed a State's regulatory authority over its residents' commercial transactions to extend wherever the residents might roam, reasoning altogether inconsistent with this Court's Due Process and Commerce Clause cases. This constitutional problem is only heightened in the context of a nationwide class action like this one, in which a state court proposes to "bootstrap" one State's constitutionally insufficient contacts with individual litigants into constitutionally *sufficient* contacts with an entire class. *Shutts*, 472 U.S. at 821. Such a course of action is precisely what *Shutts* forbids. *See id.* at 822-23 (applying *Dick* in the class context).

B. Federal Courts Of Appeals And State Courts Have Adopted Conflicting Interpretations Of This Court's Decision In *Shutts*

This Court made clear in *Shutts* that due process precludes courts from applying by rote the law of the forum, the law that facilitates class certification, or the law of the plaintiffs' election. The federal courts of appeals and several state courts have faithfully applied that teaching and hold that an individualized choice-of-law analysis is *required* before any multistate class involving state-law claims may be certified. Other jurisdictions, however, have adopted rules similar to that espoused by the court below. Ordering the classwide application of a single State's law in order to facilitate the adjudication of nonresidents' claims conflicts with these well reasoned precedents from sister jurisdictions. This Court's review is warranted to resolve this conflict.

1. The federal courts of appeals, which frequently are called upon to examine the certification of plaintiff classes in actions under state law, continue to apply *Shutts* faithfully, requiring an individualized choice-of-law analysis as part of the inquiry into the "commonality" and "predominance" re-

quirements for class certification. Because Oklahoma and a few other jurisdictions have departed from this rule, the difference in result that comes from adjudicating state-law claims in federal court rather than state court—a forum-shopping incentive that federal *Erie* rules are designed to mitigate, *see, e.g.*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)—becomes all the more stark.

The Third Circuit has spoken most directly to this issue. In *Georgine v. Amchem Products*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), the court of appeals reversed the certification of a nationwide settlement class to resolve the claims of plaintiffs exposed to asbestos. The Third Circuit held, citing *Shutts*, that adjudication of the claims of the class members would require the court to "apply an *individualized* choice of law analysis to *each plaintiff's claims*." *Id.* at 627 (emphases added); *accord, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996). The court reached this conclusion despite arguably compelling policy reasons for nationwide adjudication in the context of asbestos, which both the Third Circuit and several members of this Court viewed as desirable, though legally unworkable. *Amchem*, 521 U.S. at 628-29; *id.* at 633-34 (Breyer, J., concurring in part and dissenting in part); *Georgine*, 83 F.3d at 634. The Third Circuit's reasoning applies with even greater force to cases like this one: "no injury" class actions that do not even arguably address any nationwide problem. As this Court held in *Shutts*, the constitutional restrictions on choice of law do not yield to the procedural convenience of unified adjudication.

In a similar vein, the Ninth Circuit has rejected an attempt, much like respondents', to satisfy the commonality and predominance requirements for class certification by demanding the application of a single State's law. The putative plaintiff class in *Zinser v. Accufix Research Institute*, 253 F.3d 1180 (9th Cir. 2001), asked the district court to certify a

nationwide class and to apply the products-liability law of California, the forum State. *Id.* at 1185, 1187. The district court and the Ninth Circuit both recognized, and the plaintiffs ultimately conceded, that under *Shutts,* California law could not "be constitutionally applied to all putative class members." *Id.* at 1187. The court also rejected the plaintiffs' fallback position, to apply the law of the defendant's principal place of business to the entire class on the ground that "the application of a single state's law will allow claims to be adjudicated on a class basis." The court held that choice-of-law rules did not permit such a selection. *Id.* at 1187-88; *id.* at 1198-99 & n.3 (B. Fletcher, J., dissenting) (agreeing with the majority on the choice-of-law issue); *see also Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir. 1987) (affirming denial of certification because multiple States' laws applied, and citing *Shutts* to show that even if Georgia (the forum) "would require application of its own common law rules to some claims involving purchases in other states, the law of Georgia could be applied consistent with due process only if the particular transaction had some significant relation to Georgia").

The D.C. Circuit likewise has recognized the impropriety of assuming away the variations in the laws of the 50 States in order to facilitate class certification. In another product-defect case against an automaker in which, as here, UCC warranty provisions adopted by the various States provided the rule of decision, the court of appeals reversed the district court's certification of a nationwide class based on its failure to conduct a searching choice-of-law inquiry. *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016, 1019 (D.C. Cir. 1986) (Edwards and R.B. Ginsburg, JJ.). The district court certified the class without "inquir[ing] further into the existence and character of differences in state warranty laws." To "look to the [laws of] the many States" would make class certification "virtually impossible," the district court wrote, which suggested that it might apply the law of a single State,

or of selected States. *Id.* at 1016 & n.90. As in this case, the lower court allowed the perceived virtue of unified adjudication to trump any conflict of law.

The D.C. Circuit reversed, refusing to take "on faith" the plaintiffs' assertion that no state-law variation would impede adjudication. The Uniform Commercial Code, the court noted, "is not uniform." 807 F.2d at 1016 (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed. 1980)). Material variations in state law would prevent class certification on common questions of law. With respect to the possibility of applying a single State's law, the court of appeals noted *Shutts*'s holding that selecting the law of a single State would be unconstitutional without a showing that that State "had a significant relationship to each class member's claim." *Id.* at 1016 n.90.

2. The state courts, which in recent years have been the preferred forum for putative nationwide class actions, have for the most part followed the federal courts in interpreting *Shutts* to require a choice-of-law analysis specific to each plaintiff. For example, another multistate class alleging airbag defects was decertified on appeal precisely because the trial court applied the law of the forum, Pennsylvania, to the claims of the entire class for breach of warranty and violation of state consumer-protection statutes. *Debbs v. Chrysler Corp.*, 810 A.2d 137, 158-59 (Pa. Super. 2002). The appellate court held that the trial court's failure to conduct a choice-of-law analysis before certifying the class violated the parties' "'due process right to have their claims governed by the state law applicable to their dispute.'" *Id.* (quoting *Shutts*, 472 U.S. at 821). The court also noted that "a trial court cannot sidestep choice-of-law issues by declaring that the class action would be governed by Pennsylvania law" in the interest of "administrative convenience." *Id.* at 159.

The courts of Texas have taken a similar approach. The Supreme Court of Texas recently clarified that it would not

"apply the law of the state where a defendant is headquartered to every claim for economic damages that can be alleged against the defendant," and decertified a nationwide class accordingly. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 698 (Tex. 2002). The Texas courts have interpreted *Henry Schein*, read together with *Shutts*, to bar precisely the sort of class-driven choice-of-law analysis that the Oklahoma Supreme Court engaged in here. For example, in rejecting a Texas trial court's certification of a nationwide class based on the law of Missouri (defendant's principal place of business), the state Court of Appeals recently cautioned that such an approach was unconstitutional: "The analysis must be conducted on an individual basis; a nationwide class is not entitled to a 'looser' analysis merely because applying one state's law would be easier than applying many." *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 352 (Tex. Ct. App. 2003) (citing *Shutts*, 472 U.S. at 821-22) (footnote omitted). The court concluded that applying the law of each consumer's home State, in accord with accepted choice-of-law principles, "would protect the parties' justified expectations." *Id.* at 357; *see also Shutts*, 472 U.S. at 822 ("When considering fairness in this context, an important element is the expectation of the parties."). The Oklahoma court in this case, by contrast, *skewed* those accepted choice-of-law principles and overrode DCC's and class members' justified expectations.

3. However, not every state court has so faithfully applied *Shutts*. Some States have joined Oklahoma in implementing choice-of-law rules that expressly facilitate the certification of a nationwide class by applying a body of substantive law that would not apply to an individual claim. These States are rapidly becoming magnets for putative plaintiff classes and their counsel.

For example, the Illinois courts have repeatedly upheld certification of nationwide classes based on Illinois law. *See,*

e.g., *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 846-47 (Ill. 1987). Indeed, in a number of instances the Illinois courts have affirmed precisely what the Oklahoma Supreme Court allowed plaintiffs to accomplish in this case: application of the law of a single State based solely on the location of the defendant's headquarters. *E.g.*, *id.*; *Clark v. TAP Pharm. Prods.*, 798 N.E.2d 123, 129 (Ill. App. Ct. 2003); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254-55 (Ill. App. Ct. 2001), *appeal allowed*, 786 N.E.2d 180 (Ill. 2002). In *Clark*, for example, the court upheld the application of Illinois law to transactions between "non-Illinois class members" and "non-Illinois medical care providers," which "occurred in states other than Illinois." 798 N.E.2d at 129. This posed no constitutional problem, the court held, because the defendant was a corporation headquartered in Illinois. "'Illinois has a legitimate interest in applying its law . . . to insure that its residents [*i.e.*, corporations headquartered there] comply with its consumer-protection laws *while serving* Illinois and *out-of-state consumers*.'" *Id.* at 129-30 (quoting *Avery*, 746 N.E.2d at 1255) (emphasis added). The Illinois courts have consistently refused to concede the extraterritorial impact of this form of classwide imposition of Illinois's substantive law.

The effect of these choice of law rules has been dramatic, if predictable. Illinois state courts have become a preferred venue for plaintiffs seeking to represent nationwide classes. Citing the state courts' choice-of-law decisions, the Appellate Court of Illinois recently noted that "50-state class actions are not uncommon in Illinois." *P.J.'s Concrete Pumping Serv. v. Nextel W. Corp.*, 803 N.E.2d 1020, 1030 (Ill. App. Ct. 2004). Indeed not: "In the Third Judicial District of Madison County, Illinois, seventy purported class actions were filed between February 1998 and March 2001, of which eighty-one percent (fifty-seven cases) were brought on behalf of putative nationwide classes." John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out*

of It . . . In State Court, 25 HARV. J.L. & PUB. POL'Y 143, 169 (2001). The Illinois experience demonstrates the likely effect of a constitutionally erroneous choice-of-law rule like the one announced in this case: litigants dissatisfied with the rules that would govern them under ordinary choice-of-law principles will seek out jurisdictions with which they have no constitutionally significant contact but which will adjudicate their claims under a more favorable body of substantive law.

4. The courts of California have taken an intermediate approach to the choice-of-law problem that putative nationwide classes present. The California Supreme Court has recognized, correctly, that applying California law to the claims of a nationwide class requires a showing that California has significant contacts with "the claims of each class member." *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080 (2001). However, the court has permitted the application of a different choice-of-law rule to nationwide classes by creating a burden-shifting procedure. First, the proponent of class certification must show that "the requisite significant contacts" exist between California and the claims asserted by the class. *Id.* at 1081. Once the proponent makes that showing, California law presumptively applies to the class claims unless the opposing party can show that the interests of other States outweigh California's and that the law of one or more foreign States should therefore control. The court rejected the argument that "California may not constitutionally weigh the scales in favor of applying its own law." *Id.*[4]

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[4] Even under this approach, the decision below could not stand, because the Oklahoma court *itself* acknowledged that States other than Oklahoma and Michigan have a significant interest in applying their own laws to the product sales at issue in this case, an interest that the court subordinated to the perceived benefits of class certification. *See, e.g., J.P. Morgan & Co. v. Superior Court*, 6 Cal. Rptr. 3d 214, 234-35 (Ct. App. 2003) (applying *Washington Mutual* and rejecting certification of a nationwide class with mem-

Justice Maynard of the West Virginia Supreme Court of Appeals recently offered a neat summation of the ongoing problem in the lower courts of that State, and others. He warned that the availability of liberal choice-of-law rules was causing an "improper pilgrimage" into West Virginia state court by plaintiffs seeking collective adjudication. *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 794, 795 (W. Va.) (Maynard, J., concurring), *cert. denied sub nom. Mobil Corp. v. Adkins*, 537 U.S. 944 (2002). "[B]ecause so many of the plaintiffs have NO connection whatsoever with West Virginia, and because the United States Supreme Court was so clear in the [*Shutts*] case," he wrote, he was fearful of "eventual reversal" on due process grounds. *Id.* Justice Maynard was confident that the due process violation would prove serious, and that "some federal court will eventually tell us so." *Id.* at 794.[5] Justice Maynard's opinion makes clear that some state appellate courts cannot or will not intervene to correct constitutional error in the aggregation of plaintiffs' claims; both they and the trial courts they supervise require further guidance from this Court on the constitutional principles elucidated in *Shutts* and implicated in every multistate class action applying state law.

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bers from States with laws materially different from California's, because it was "necessary to weigh the interest of those states as against the interest of California in resolving the classwide claims of nonresident class members," and because these claims "lack[ed a] significant connection . . . to California"). The decision below therefore conflicts with California's intermediate approach to the due process issue, as well as with the holdings of state courts that more squarely apply this Court's decision in *Shutts*.

[5] Justice Maynard concurred in the court majority's opinion denying relief because the case was before the court on a petition for an extraordinary writ, rather than on a direct appeal.

II. The Oklahoma Court's Nationwide Certification Conflicts With Decisions Interpreting The Commerce And Due Process Clauses' Restrictions On Extraterritorial Regulation By The States

The Oklahoma court's decision has a substantive impact in all 49 other States and the District of Columbia. The plaintiffs' causes of action under the Uniform Commercial Code cannot succeed unless the UCC warranty provisions are construed broadly, in a variety of ways. A number of the plaintiff class members' home States—where their minivans were advertised, purchased, driven, and owned to this day without incident—have already *definitively rejected* one or more of the constructions of warranty law on which the plaintiffs' claims rest. Those States are entirely within their rights to provide that DCC has breached no duty to their citizens. Yet the Oklahoma court's application of Michigan substantive law to those transactions has the effect of displacing those States' own regulatory regimes and replacing them with one into which the Oklahoma courts may read a viable claim. "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1993), and no State may apply a rule of law that conflicts with this Court's decisions interpreting the constitutional constraints on extraterritorial regulation.

1. The Commerce Clause prohibits States from engaging in precisely this sort of extraterritorial regulation without the consent of Congress. In *Healy v. Beer Institute*, 491 U.S. 324 (1989), this Court struck down Connecticut's attempt to project its alcoholic beverage control regime into its neighbor States. *Id.* at 337. As in this case, Connecticut had adopted a regulatory regime that had the "undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id.*

The certification of a single body of law to govern the entire class threatens to extinguish the contrary regulatory regimes of Oklahoma and Michigan's sister States—regimes under which many class members' claims against DCC are plainly barred. For example, many class members cannot recover under their own States' laws on a "no-injury" claim for breach of warranty like the one they assert here, a claim premised on an alleged, as-yet unmanifested product defect that has caused no harm. *E.g.*, *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d at 803-04. Other class members could not recover because they purchased their minivans from retailers, rather than from DCC, and their home States require plaintiffs suing for breach of express warranty, implied warranty, or both to show vertical privity with the defendant. *E.g.*, *Flory v. Silvercrest Indus.*, 633 P.2d 383, 387 (Ariz. 1981). Other States preclude class members who purchased a *used* minivan from suing DCC, the original manufacturer, for breach of implied warranty. *See, e.g.*, CAL. CIV. CODE § 1791.1; *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. Ct. App. 1983).

A substantial number of plaintiff class members assert claims that, if brought individually, would be governed by state law that precludes their recovery. For example, to permit a California used-minivan purchaser to recover under some *other* State's law when the law of her *own* State precludes recovery against the manufacturer plainly amounts to regulation of the market for used vehicles in California, a form of regulation unjustified by any contacts between the forum State and the transaction being regulated. Indeed, a number of the state-court cases certifying nationwide classes concede that the effect of such a decision is to regulate transactions with customers in other States. *E.g.*, *Clark*, 798 N.E.2d at 129-30 (applying Illinois consumer-protection law to companies "'serving Illinois and *out-of-state consumers*.'" (quoting *Avery*, 746 N.E.2d at 1255) (emphases added)).

2. This Court has consistently applied due process principles as well as the Commerce Clause to strike down such extraterritorial regulatory efforts. As Justice Stevens explained in *Allstate*, this Court's due process cases prohibit States from applying their own choice-of-law principles and substantive law with the effect of "materially enlarging the contractual obligations of one of the parties where that party had no reason to anticipate the possibility of such enlargement." 449 U.S. at 327 n.16 (Stevens, J., concurring in the judgment). Here, although California law limits a manufacturer's implied warranty to the initial purchaser, the Oklahoma court's class-certification decision effectively rewrites that contractual obligation and, if Michigan law contradicts California's rule, allows every California minivan purchaser the additional opportunity to pass on the manufacturer's implied warranty through resale. The Oklahoma courts' nationwide certification thus rewrites DCC's warranty obligations across the country.

Likewise, this Court's recent punitive damages cases expressly invoke the Due Process Clause's limitations on one State's power to punish conduct legal in other States. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred." (citations omitted)); *BMW*, 517 U.S. at 571-73 & n.16 (same) (citing *Healy*, 491 U.S. at 335-36; *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); and *Huntington v. Attrill*, 146 U.S. 657, 669 (1892)). Indeed, in *State Farm* this Court cited *Shutts* for the proposition that "[a]ny proper adjudication of conduct that occurred outside Utah [the forum State] to other persons" would be governed by the State laws applicable to those other persons. 123 S. Ct. at 1522.[6]

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[6] For this reason, this litigation may put DCC in a no-win situation: even if DCC prevails in the Oklahoma action on Michi-

The Oklahoma court's decision effectively makes an end run around *State Farm* and *BMW*. By certifying a nationwide class according to a single State's law—in a case in which the plaintiffs demand punitive damages—the court *requires* an Oklahoma court to consider awarding damages based on conduct legal where it occurred, because the class certification permits plaintiffs from States in which DCC is unquestionably free of liability to pursue their claims under Michigan law, and to seek damages.

The certification of a nationwide class in this case is a plain circumvention of the federal system's restrictions on extraterritorial regulation, as set forth in this Court's cases. This Court should exercise plenary review to correct both the Oklahoma court's disregard of controlling authority and the resulting disruption of interstate commerce.

III. The Questions Presented Are Important And Recur Frequently, And Courts Conducting Nationwide Class Certification Proceedings Require This Court's Guidance At The Earliest Possible Stage

State courts are requested to certify nationwide classes with increasing frequency. Indeed, in certain state courts, requests for nationwide class certification are becoming the norm rather than the exception. *E.g.*, DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS 124 n.15 (2000) (reporting that one study found that more than half the certified classes in Alabama courts were nationwide in scope); Beisner & Miller, *supra*, at 156-57, 160-61, 169 (noting the growth of nationwide class actions filed in state courts).

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gan-law grounds, some plaintiff class members may return to their home States to pursue warranty claims, claiming that they are not bound by the Oklahoma courts' application of Michigan law to resolve their claims in DCC's favor.

These cases create an acute need for guidance on the correct constitutional standard for choice-of-law determinations in nationwide class actions. Demands to apply the law of a single State in such actions are likewise becoming far more common. Choice-of-law questions are presented in virtually *every* nationwide class action applying state law, and in many cases the resolution of those questions will be a dispositive factor in the decision whether or not to certify. Most States that allow class actions apply some version of the federal Rule 23 requirements of commonality, typicality, predominance, and manageability, *see* FED. R. CIV. P. 23(a)(2), (a)(3), (b)(3), (b)(3)(D), all of which are directly implicated by a decision that the law of multiple States governs the claims of the class. *See Henry Schein*, 102 S.W.3d at 698 nn.91-92 (collecting dozens of federal and state cases in which the need to apply multiple States' laws was dispositive of class certification). Thus, guidance from this Court on the choice-of-law question will likely affect a large fraction of class-certification decisions in multistate class actions brought in both state and federal courts.

The conflicting decisions of those courts make the need for review all the more urgent. Even if only a few States misapply this Court's Due Process and Commerce Clause precedents to create choice-of-law rules that permit the nationwide application of a particularly plaintiff- or defendant-friendly body of law, the floodgates are opened: parties everywhere can override their home States' public policies by obtaining nationwide class certification in the courts of another State. For this reason, the interstate conflict created by the decision of the Oklahoma Supreme Court and a few other state courts is of considerable significance to the federal system, and this Court's review is warranted to correct it.

IV. The Judgment Below Is Final For Purposes Of This Court's Review Under 28 U.S.C. § 1257(a)

The decision below finally resolved the important questions of federal constitutional law presented in this petition. The Oklahoma Supreme Court squarely rejected DCC's arguments that the federal Constitution precludes courts from certifying a nationwide class without conducting a choice-of-law analysis specific to the individual class members' claims. If not reviewed *now*, the decision below threatens to erode fundamental principles of federalism—including constitutional limits on choice of law and comity among sister States—and to evade review altogether. Accordingly, the judgment is final for purposes of 28 U.S.C. § 1257(a).

The Court follows a "pragmatic approach" when determining whether a state court decision is "final" under § 1257(a). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). There are "at least four categories" of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be held in state court. *Id.* at 477. The fourth such category involves "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and where "reversal of the state court on the federal issue would be preclusive of any further litigation." *Id.* at 482-83. In these circumstances, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483; *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988) (granting certiorari where the decision below "might seriously erode federal policy in the area of nuclear production"); *Southland*

Corp. v. Keating, 465 U.S. 1, 6-8 (1984) (granting certiorari where the decision below threatened to erode enforcement of arbitration agreements under the Federal Arbitration Act).

The fourth *Cox Broadcasting* category is applicable here. The constitutional issues presented in the petition have been finally decided by the court below, which rejected DCC's contention that certification of a nationwide class action under Michigan law, without conducting a choice-of-law analysis specific to the individual class members' claims, violates several provisions of the federal Constitution. *See supra* note 2. Although the state court remanded for further proceedings, such proceedings will not crystallize or finalize the disposition of the federal questions; to the contrary, the litigation may well terminate on the basis of nonfederal issues, thereby depriving this Court of the opportunity to decide the important constitutional issues at stake. *Cox Broadcasting*, 420 U.S. at 482.

Furthermore, reversal of the decision below would be "preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting*, 420 U.S. at 482-83. A determination by this Court that the Constitution requires that the laws of all 50 states and the District of Columbia be applied to the nationwide class members' claims would terminate this litigation as a practical matter. As the opinion below acknowledges, "[a]pplying the law of 51 jurisdictions . . . presents an overwhelming burden which would make the class unmanageable and a class action determination . . . inappropriate." App., *infra*, 16a. Moreover, following a constitutionally adequate choice-of-law analysis, neither named respondent could maintain any cause of action under Michigan warranty law in the Oklahoma court. Accordingly, reversal of the decision below would terminate this lawsuit.

Finally, it is readily apparent that "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 483. The Okla-

homa courts' certification of a nationwide class under Michigan law, without conducting a choice-of-law analysis specific to individual class members' claims, heavily undermines constitutional interests in federalism. These interests, through the Commerce and Due Process Clauses, restrain an individual state court's authority within our federal system.

Where, as here, the federal issue concerns the basic authority of the state court to adjudicate specific claims between specific litigants, this Court consistently has exercised jurisdiction despite the availability of further state court proceedings that might lead to the termination of the dispute on non-federal grounds. For example, this Court has taken jurisdiction to decide whether the state court in which further proceedings would be held had the authority to adjudicate a dispute or instead was required by federal law to refer it to arbitration. *Southland Corp.*, 465 U.S. at 6-7. Similarly, this Court has reviewed the question whether the state court lacked personal jurisdiction over a defendant and thus, under the Due Process Clause, could not adjudicate the dispute. *Calder v. Jones*, 465 U.S. 783, 788 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n.12 (1977). And this Court similarly exercised jurisdiction to decide whether the state court lacked authority to adjudicate a claim because federal law compelled a change of venue. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 649-652 (1992); *Am. Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 640-42 (1976); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

In this case, the federalism issues implicated by the ruling below are just as significant and deserving of immediate review, if not more so. *Cf., e.g., P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993) (reviewing a sovereign immunity claim interlocutorily owing to the "importance of ensuring that the States' dignitary interests can be fully vindicated"). The federal question is the constitutionality of the state court's proposed adjudication: not

only does further delay entail exponentially greater cost, it imposes on DCC precisely the burden against which it is invoking the protections of the Due Process and Commerce Clauses. Where federal policies affecting the scope and form of litigation are at issue, it serves the underlying policy of finality "to determine now [how] appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank*, 371 U.S. at 558; *see also Southland Corp.*, 465 U.S. at 7-8 (noting that delayed review of a state decision denying enforcement of an arbitration contract would defeat the core purpose of a contract to arbitrate).[7]

Moreover, a grant of class status "can propel the stakes of a case into the stratosphere," thereby pressuring a defendant to settle and precluding future review of federal issues, "even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (noting that "some plaintiffs or even

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[7] This Court has not previously considered whether a *grant* of class certification is reviewable under *Cox Broadcasting*. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court considered whether a denial (rather than a grant) of class certification was "final" under 28 U.S.C. § 1291, not § 1257. Similarly, in *Gillette Co. v. Miner*, 459 U.S. 86 (1982) (per curiam), the Court, which dismissed certiorari for want of jurisdiction without further explanation, was asked to consider a federal interest different from the one raised here. *Gillette* concerned the constitutionality of a state court's personal jurisdiction over unnamed class plaintiffs, while this petition concerns constitutional limitations on a state's choice of law with respect to specific transactions. *See Shutts*, 472 U.S. at 821 ("The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law.").

some . . . judges may be tempted to use the class device to wring settlements from defendants"). Indeed, such settlement pressures were a motivating factor behind this Court's adoption of Rule 23(f) of the Federal Rules of Civil Procedure in 1998. FED. R. CIV. P. 23(f) advisory committee's notes ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). Notably, federal courts of appeals are instructed that their discretion to conduct interlocutory review under Rule 23(f) is "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Id.*[8] The possibility of certiorari review reduces the danger that a constitutionally erroneous class certification (and the resulting impact on interstate federalism) will never be reviewed precisely because even a nationwide class advancing meritless claims poses a real threat of crippling liability, "'economic waste and . . . delayed justice'" that could create undue incentives to settle. *Cox Broadcasting*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *see Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] All federal circuits that have interpreted Rule 23(f) have recognized that interlocutory appeal is appropriate "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claims is substantial." *Blair*, 181 F.3d at 835; *see also Tilley v. TJX Cos.*, 345 F.3d 34, 37 (1st Cir. 2003); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (same); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1272, 1274 (11th Cir. 2000) (same).

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March 19, 2004

APPENDIX

APPENDIX A

YSBRAND v. DAIMLERCHRYSLER CORP.
2003 OK 17
81 P.3d 618
Case Number: 97469
Decided: 02/25/2003

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Sheryl Ysbrand and Mary Cooney, individually and on behalf of all others similarly situated, Appellees,

v.

DaimlerChrysler Corporation, a Delaware Corporation, individually and as successor in Interest to Chrysler Corporation and Chrysler Corporation, a Delaware Corporation, individually, Appellants.

APPEAL FROM DISTRICT COURT,
SEQUOYAH COUNTY
Honorable John C. Garrett, Judge

¶0 Buyers asserted warranty and common law fraud claims against automobile manufacturer for alleged defects in front passenger seat air bags of certain of its minivans. Matter was certified as class action and manufacturer appeals.

AFFIRMED IN PART;
REVERSED IN PART.

Clyde A. Muchmore, Harvey D. Ellis, Jr., Courtney K. Warmington, Crowe & Dunlevy, Oklahoma City, Oklahoma for Appellants.

Peter W. Herzog, III, Bryan Cave, St. Louis, Missouri, for Appellants.

Thomas G. Wolfe, Lyndon W. Whitmire, Phillips, McFall, McCaffrey, McVay & Murrah, Oklahoma City, Oklahoma, for Appellants.

Harry Scoufos, Sallisaw, Oklahoma, for Appellees.
Darleen Jacobs, New Orleans, Louisiana, for Appellees.
James Minge, New Orleans, Louisiana, for Appellees.
Joseph J. McKernan, Baton Rouge, Louisiana, for Appellees.
Patrick W. Pendley, Plaquemine, Louisiana, for Appellees.
Robert E. Reeves, Lexington, Kentucky, for Appellees.
Anthony Majestro, Masters & Taylor, Charleston, West Virginia, for Appellees.
Stephen E. Van Gaasbeck, San Antonio, Texas, for Appellees.

Hodges, J.

¶1 This opinion reviews the trial court's determination that this dispute meets the requirements for a class action found at Title 12, section 2023, of the Oklahoma Statutes. The class certification order is affirmed as to the warranty claims asserted but is reversed as to the claim for fraud and deceit.

¶2 Defendant, DaimlerChrysler, is a Delaware corporation with its principal place of business in Michigan. It manufactured over one million 1996 and 1997 model "minivans" equipped with front passenger seat air bags. Plaintiffs, each an owner of one of the minivans, have asserted Uniform Commercial Code claims for "breach of express warranty," "breach of implied warranty of merchantability," and "breach of implied warranty of fitness." In addition, they assert a claim for "fraud and deceit."

¶3 Plaintiffs' claims are based on their assertion that the front passenger seat air bags are defective due to "1) their propensity to deploy with overly aggressive force and 2) their propensity to deploy during a low speed collision." Plaintiffs further assert that DaimlerChrysler failed to warn purchasers

that this defect has the potential to kill or seriously injure a child or small adult seated in the front passenger seat.[1] According to Plaintiffs, there are air bags available which deploy with less force and at higher collision speeds. They claim that these bags are currently used as replacements when a bag has been deployed. Plaintiffs seek damages in an amount sufficient to allow owners to install the "safer" air bags or, in the alternative, replacement of the "defective" air bags by DaimlerChrysler.

¶4 Following initial discovery and a hearing, the trial court issued a twenty-one page order certifying a class consisting of Plaintiffs and

> [a]ll entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia, who purchased and who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one (1) model year 1996-1997 "minivan" automobile marketed by defendant as Chrysler Town & Country or Chrysler Minivan or Plymouth Voyager or Plymouth Grand Voyager or Dodge Caravan, which was manufactured by defendant for sale in any of the fifty states of the United States of America or the District of Columbia, or which defendant marketed in any of the fifty states of the United States of America or the District of Columbia as a product of its own manufacture, which was configured at the time of original sale or occupancy by at least five (5) passengers, and which contains on the

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[1] Plaintiffs' claim for fraudulent misrepresentation is based not on a failure to warn of the dangers of air bags generally. Rather, the claim is based on the failure to warn small adults and children over 12 of the dangers of over aggressive deployment of the air bags and their tendancy to deploy at low speed impacts.

> driver side and/or passenger side of the forward seating area a passive restraint system commonly known as an "air bag," which employs a fabric-covered envelope designed to expand rapidly with sodium azide or other gases and thus cushion a front-seat occupant when the system is activated by a sensor during a frontal collision.

Excluded from the class were (1) those who have suffered personal injury from air bag deployment, (2) DaimlerCrysler employees and affiliates, (3) judges and judicial personnel, (4) those who have had their air bags deactivated, and (5) those who had the original air bags replaced.[2] DaimlerChrysler now appeals the class certification order and the matter has been retained for this Court's review.

¶5 A trial court's class certification order is reviewed for abuse of discretion. *Scoufos v. State Farm Fire & Cas. Co.*, 2001 OK 113, 41 P.3d 366, 367. "An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Patel v. OMH Med. Ctr. Inc.*, 1999 OK 33,

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[2] The trial court's class certification followed the litigation of similar issues in Louisiana and unsuccessful attempts to remove this case to federal court. The decision in *In re Air Bag Products Liability Litigation*, 7 F.Supp.2d 792 (E.D. La. 1998), involved allegations of air bag defects against several automobile manufacturers and dealers. All claims were dismissed or summarily adjudicated in favor of defendants under Louisiana and Texas law. No class certification was involved. Thus, nothing about that decision impacts the issue of class certification presented in this litigation.

The class certification also followed the refusal of the National Highway Traffic Safety Administration (NHTSA) to further investigate following its determination that vehicles, including 1996 Chrysler minivans, "had rates of air bag deployments per 100 collision claims that are similar to that of many other vehicles." In doing so, NHTSA noted its "need to allocate and prioritize [its] limited resources."

987 P.2d 1185, 1194. If the record does not demonstrate that the requisites for class action have been met, the trial court has abused its discretion. *Greghol Ltd. Partnership v. Oryx Energy Co.*, 1998 OK CIV APP 111, 959 P.2d 596, 598. "The pragmatically correct action, in the face of a close question as to certification, has been said to sustain certification because if it develops later during the course of the trial that the order is ill-advised, the order is always (prior to judgment on the merits,) subject to modification." *Perry v. Meek*, 618 P.2d 934, 940 (Okla. 1980).

¶6 Class action is a procedural device provided by Title 12, section 2023, of the Oklahoma Statutes.[3] It permits

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[3] Section 2023 provides:

A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;

2. There are questions of law or fact common to the class;

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4. The representative parties will fairly and adequately protect the interests of the class.

B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

[Footnote continued on next page]

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b. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

d. the difficulties likely to been countered in the management of a class action.

C. DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

1. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under

[Footnote continued on next page]

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this subsection may be conditional, and may be altered or amended before the decision on the merits.

2. In any class action maintained under paragraph 3 of subsection B of this section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

a. the court will exclude him from the class if he so requests by a specified date,

b. the judgment, whether favorable or not, will include all members who do not request exclusion, and

c. any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Where the class contains more than five hundred (500) members who can be identified through reasonable effort, it shall not be necessary to direct individual notice to more than five hundred (500) members, but the members to whom individual notice is not directed shall be given notice in such manner as the court shall direct, which may include publishing notice in newspapers, magazines, trade journals or other publications, posting it in appropriate places, and taking other steps that are reasonably calculated to bring the notice to the attention of such members, provided that the cost of giving such notice shall be reasonable in view of the amounts that may be recovered by the class members who are being notified. Members to whom individual notice was not directed may request exclusion from the class at any time before the issue of liability is determined, and commencing an individual action before the issue of liability is determined shall be the equivalent of requesting exclusion from the class.

3. The judgment in an action maintained as a class action under paragraphs 1 or 2 of subsection B of this section, whether or not favorable to the class, shall include and de-

[Footnote continued on next page]

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scribe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph 3 of subsection B of this section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph 2 of subsection C of this section was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

4. When appropriate:

a. an action may be brought or maintained as a class action with respect to particular issues, or

b. a class may be divided into subclasses and each subclass treated as a class. The provisions of this section shall then be construed and applied accordingly.

D. ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this section applies, the court may make appropriate orders:

1. Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

3. Imposing conditions on the representative parties or on intervenors;

4. Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and

[Footnote continued on next page]

plaintiffs to "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980). Section 2023 requires, as does its federal counterpart; numerosity, commonality, typicality, and adequacy of representation. In addition, the court must find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at § 2023 (B)(3).

¶7 DaimlerChrysler challenges the trial court's determination that each of these requirements was demonstrated by Plaintiffs. Its challenge is focused primarily on whether common questions of law and fact predominate and whether a class action is superior to other available methods of adjudicating the controversy. DaimlerChrysler also argues that the class representatives and their counsel are inadequate.

[Footnote continued from previous page]

> 5. Dealing with similar procedural matters. The orders may be combined with an order under Section 16 of this act and may be altered or amended as may be desirable from time to time.
>
> E. DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

I. COMMON ISSUES OF LAW OR FACT
A. Issues of Law

¶8 DaimlerChrysler argues that common issues of law or fact do not predominate because varying state laws will apply to the asserted claims and defenses. It cites *KMC Leasing, Inc v Rockwell-Standard Corp.*, 2000 OK 51, 9 P.3d 683, in which this Court found no abuse of discretion in the trial court's refusal to certify a class for lack of predominating issues. The proposed class consisted of private aircraft owners who alleged four different product defects against multiple defendants in different states. The matter required application of differing terms in hundreds of nonuniform aircraft purchase contracts. *Id.* at 690-691. Because the substantive law of numerous states applied to issues which were not common to the entire class, there was no predominance and the trial court did not err in refusing to certify the class. *Id.*

¶9 In this matter the trial court determined that "the alleged choice of law problems identified by [DaimlerChrysler did] not bar certification." It relied upon *In re Bridgestone/Firestone Inc Tires Liability Litigation*, 155 F. Supp.2d 1069 (S.D. Ind. 2001), which granted class certification upon a finding of predominance.

¶10 In *Firestone*, a federal district court sitting in Indiana determined which state's substantiative law applied to a nationwide state law class action. Buyers had asserted tort and contract claims against Ford Motor Co. and Bridgestone/Firestone, Inc. for alleged tire defects on Ford's Explorer model sport utility vehicle. The court reasoned that because "the relationship between the parties [was] simply that of buyer and seller," the place where the products were purchased was not significant to the claims for product defect. *Id.* at 1082. Rather, it was "the conduct of Defendants as manufacturers" which was the focus of the litigation. *Id.*

Therefore, the law of Michigan and Tennessee, the principal places of business of the manufactures, controlled.[4]

¶11 The trial court's application of *Firestone* to this matter evidences its intent to apply the substantive law of Michigan, DaimlerChrysler's principal place of business, to the claims and defenses asserted. Application of Oklahoma's choice of law rules supports that conclusion.

1. Choice of Law - UCC Claims

¶12 The "most significant relationship" test applies to an action for breach of warranty in a sale of goods under Article 2 of the UCC. *See Collins Radio Co. v. Bell*, 623 P.2d 1039, 1046-47 (Okla. Ct. Civ. App. 1980) ("The same rationale for accepting the [most significant relationship test] for torts dictates that its application should be made to actions that fall under Article 2 of the Uniform Commercial Code.") *See also Bohannan v. Allstate Ins. Co.*, 820 P.2d 787, 795 (Okla. 1991) ("[T]he UCC supports the most significant relationship test as applied in *Collins Radio*.") This test is guided by principles and contacts from the Restatement (Second) of Conflicts (1971). It determines which

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[4] The Court of Appeals for the Seventh Circuit reversed the decision. *See In re Bridgestone/Firestone Inc.*, 288 F.3d 1012 (7th Cir. 2002) cert. den. 71 USLW 95368 (U.S. Jan. 16, 2003). It did so based on its determination that "Indiana is a lex loci delecti state: in all but exceptional cases it applies the law of the place where harm occurred." *Id.* at 1016. As a result, "Indiana's choice-of-law rule selects the 50 states and multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits." *Id.* at 1018. Thus, "[b]ecause these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable." *Id.* Although the Seventh Circuit rejected the lower court's conclusion as to which choice of law rule Indiana utilizes, the lower court's analysis under a most significant relationship test remains persuasive.

state's law is most directly connected to the parties and the transaction.

¶13 Under section 6 of the Restatement, the factors relevant to any choice of law decision include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

The contacts to be considered in applying these principles to an issue in contract[5] include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *The contacts are to be evaluated according to their relative importance with respect to the particular issue.*

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[5] This rule applies only in situations where the parties have not chosen the applicable law. The parties have not directed this court to a choice of law provision in their contract.

Id. at § 188(2) (emphasis added). However, a third provision, section 191, applies to a sale of interests in chattel. "So in a contract for the sale of goods the most significant contact is the place of delivery unless another state has a more significant relationship." *Collins Radio*, 623 P.2d at 1047. As comment f. to section 191 explains: "On occasion, a state which is not the place of delivery will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction, the parties and the chattel and hence the state of the applicable law." The particular dispute in this matter presents such an occasion in which "the local law of some state other than that of delivery should be applied in any event because of the intensity of the interest of that state in the determination of the particular issue." *Id.*

¶14 All 50 states and the District of Columbia bear some relationship to the parties and transactions in this dispute by virtue of the nationwide sales of the minivans. The question becomes whether the relationship of each state where the vehicles were purchased is more significant to the parties and this litigation than that of Michigan, the principal place of business of DaimlerChrysler.

¶15 The *Restatement's* section 188(2) contacts of the place of contracting, the place of negotiation and performance, and the location of the subject matter are of diminished significance to the sales of the minivans. The UCC warranties are not something which is negotiated in the purchase of a new car. Thus, the relative interest of each buyer's home state in applying its version of the UCC is more or less equal. By contrast, Michigan's interest in having its regulatory scheme applied to the conduct of a Michigan manufacturer is most significant. Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made. Michigan is the only state where conduct relevant to all class members occurred. The principal place of DaimlerChrysler's business is the most important contact with respect to the UCC warranty claims.

¶16 The selection of Michigan law furthers the relevant factors stated in section 6 of the *Restatement*. The needs

of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions. While the interest of each home state in applying its local law is significant, Michigan's interest in the conduct of its manufacturer, and thus its connection to the warranty issues, is greater. Michigan law applies. It should be noted that this conclusion is consistent with the constitutional imperative that "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

2. Choice of Law - Fraud and Misrepresentation

¶17 Section 148 of the *Restatement*[6] applies to actions to recover pecuniary damages for false representations

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[6] § 148. Fraud and Misrepresentation

(1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiffs action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

(2) When the plaintiffs action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:

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whether fraudulent, negligent, or innocent. Subsection (2) applies to this dispute because the nationwide representations in DaimlerChrysler's advertising were made in states outside each class member's home state. The home state is where each class member acted in reliance on those representations by purchasing a minivan. Thus, this Court is directed to consider:

(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,

(b) the place where the plaintiff received the representations,

(c) the place where the defendant made the representations,

(d) the domicil, residence, nationality, place of incorporation and place of business of the parties,

(e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and

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[Footnote continued from previous page]

(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,

(b) the place where the plaintiff received the representations,

(c) the place where the defendant made the representations,

(d) the domicil, residence, nationality, place of incorporation and place of business of the parties,

(e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and

(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

The comments to subsection (2) describe (a), (b), (c), and (d) as the "more important of these contacts." Comment j. articulates the general approach:

> If any two of the above-mentioned contacts, apart from the defendant's . . . place of business, are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues. So when the plaintiff acted in reliance upon the defendant's representations in a single state, this state will usually be the state of the applicable law, with respect to most issues, if (a) the defendant's representations were received by the plaintiff in this state, or (b) this state is the state of plaintiffs domicil . . . .

¶18 In this matter, each class member presumably received the representation in their home state, their place of domicile. Therefore, the contacts point to each class member's home state for the applicable law. Applying the law of 51 jurisdictions to the fraud claim presents an overwhelming burden which would make the class unmanageable and a class action determination of that claim inappropriate. The class action certified by the trial court will go forward only on the warranty claims asserted.

B. Issues of Fact

¶19 The trial court found that the operative facts giving rise to the claims against DaimlerChrysler raise two questions which are common to the entire class: (1) whether the air bags are defective and (2) whether DaimlerChrysler withheld information concerning the alleged defect from those who purchased the minivans. As the trial court observed, "[t]he resolution of these issues will be applicable to each and every class member and will be dispositive of every class member's claim." As the fraud claim is no longer part of the class action, factual disputes concerning that claim no longer present litigable issues to be resolved.

¶20 DaimlerChrysler argues that the need for individual proof of each class member's reliance on the express warranty defeats predominance. Plaintiffs respond that any need for particularized proof of reliance does not defeat the commonality and typicality of the issue of product defect.

¶21 Whether individual findings of reliance are required goes to the merits of the claims. It is a question of Michigan law. A need for individual findings would not, however, defeat class certification. "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Lobo Explorations Co. v. Amoco Productions*, 1999 OK CIV APP 112, 991 P.2d 1048, 1055 (quoting *Alpern v. Utili Corp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). *See also Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("[W]here the lawsuit challenges a . . . practice or policy that affects all of the putative class members . . . . individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality."); *Newton v. Merrill Lynch*, 259 F.3d 154, 183 (3d Cir. 2001) (It is not required that "class members share every factual and legal predicate to meet the commonality and typicality standards."). The trial court remains free to maintain the class with respect to particular issues or create subclasses should the need arise. *See* Okla. Stat. tit 12, § 2023(C)(4) (2001).

II. SUPERIORITY

A. Class Action versus Administrative Remedy.

¶22 DaimlerChrysler argues that a class action is not superior because the National Traffic and Motor Vehicle Safety Act impliedly preempts this warranty and common law tort action. Thus, it urges, the National Highway Traffic Safety Administration (NHTSA) must adjudicate this controversy. The Act, however, expressly provides that compliance with its provisions does not immunize a manufacturer from liability under common law or for warranty claims. 49 U.S.C. § 30103.

¶23 DaimlerChrysler also argues that, without regard to implied administrative preemption, the administrative remedy of a NHTSA complaint is superior to a class action. The argument must fail.

¶24 A class action may be maintained only when it is "superior to other *available* methods for the fair and efficient adjudication of the controversy." Okla. Stat. tit. 12, § 2023(B)(3) (2001) (emphasis added). There is no administrative method of adjudication available to Plaintiffs. The NHTSA has declined to investigate further. *See supra* n.1. An alternate method for adjudication must be *available* in order for it to be superior.

¶25 The question then becomes whether class action is superior to individual litigation. As the trial court found, the individual claims are not substantial enough to support individual litigation. In addition, the prosecution of separate individual actions would inevitably result in inconsistent results.

B. Logistics of Class Management

¶26 Contrary to the assertion of DaimlerChrysler, a "very expensive and time consuming vehicle by vehicle inspection" of each minivan is not required in order to determine whether an owner is a class member. The class consists only of minivans configured for five or more passengers which have not had the air bags deactivated or replaced. A determination of whether a minivan retains an active factory equipped air bag can be made at the time of replacement of the air bag should the Plaintiffs prevail on the issue of product defect.

¶27 There will be logistical problems in any nationwide class action. The fact that travel for counsel, parties, and witnesses will be necessary would be true no matter where the action was pursued. Plaintiffs have chosen Sequoyah County. None of the logistical problems, however, prevent the trial court from resolving this dispute as a class action. As the trial court observed, the advantage of adjudi-

cating the common issues in a single proceeding far outweighs the logistic demands of class treatment.

III. ADEQUATE PROTECTION OF THE INTERESTS OF THE CLASS

¶28 Section 2023(A)(4) requires that a class action may be maintained only if "[t]he representative parties will fairly and adequately protect the interests of the class." This requirement is met when the record demonstrates that the class representatives interests do not conflict with those of the class and that the class representatives will fully and effectively represent the interests of the class. *See Black Hawk Oil*, 969 P.2d at 346 & 347.

¶29 DaimlerChrysler asserts that "the class representatives and their counsel are inadequate." Yet, it fails to identify any divergence between the interests of the class representatives and those of the class. Rather, DaimlerChrysler suggests that Plaintiffs are inadequate class representatives because they were solicited to merely lend their names to a suit entirely controlled by Plaintiffs' counsel.

¶30 The record in this matter supports the trial court's finding that no improper solicitation of Plaintiffs occurred as well as its findings that Plaintiffs are adequately informed as to the facts of the case, their responsibilities as class representatives, and their knowledge of the litigation. As class representatives, Plaintiffs are not required to have an attorney's knowledge of the litigation.

¶31 The trial court's finding concerning Plaintiffs' counsel is also supported by the record. The trial court did not, as DaimlerChrysler claims, merely parrot unsupported assertions made by Plaintiffs' counsel concerning counsels' experience and success in litigation when they drafted the

class certification order for the judge's signature.[7] The trial court based its conclusion that counsel was competent to prosecute the claims on counsels' *curriculum vitae* and on the fact that some of the counsel had litigated class actions in that court. The trial court did not abuse its discretion in determining that the class representatives and their counsel are adequate to protect the interests of the class.

CONCLUSION

¶32 This Court's review of the decision to certify this matter as a class action reveals no abuse of discretion as to the warranty claims.[8] Common questions of law and fact predominate, class action presents a superior method for adjudicating the common issues, and the representative parties and their counsel are adequate to protect the interests of the class. This Court expresses no opinion as to the merits of any of the remaining claims and defenses asserted.

AFFIRMED IN PART;
REVERSED IN PART.

Opala, V.C.J., Hodges, Lavender, Kauger, Summers, Boudreau, JJ., concur.

Watt, C.J., Hargrave, J., concur in part; dissent in part.

Winchester, J., dissents.

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[7] This Court rejects DaimlerChrysler's suggestion that there is something improper or irregular in a trial judge signing an order which has been prepared by the prevailing party.

[8] The class certification remains subject to modification and "may be altered or amended before the decision on the merits." Okla. Stat. tit. 12, § 2023(C)(1) (2001). If necessary the class "may be divided into subclasses and each subclass treated as a class. *Id.* at § 2023(C) (4).

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR SEQUOYAH COUNTY
STATE OF OKLAHOMA

SHERYL YSBRAND and MARY COONEY, Individually and on behalf of all others Similarly situated,	)	[Filed Feb. 14, 2002]
Plaintiffs,	)	
vs.	)	Case No. CJ-2000-643
DAIMLERCHRYSLER CORPORATION, A Delaware corporation, individually and as Successor in interest to Chrysler Corporation And CHRYSLER CORPORATION, a Delaware corporation, individually,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This Cause is before the Court on Plaintiff's Motion for Class Certification. This Court has reviewed and considered all of the pleadings in this matter, the parties' respective

briefs, the documents, exhibits, presentations, admissions and arguments received in evidence during the class certification hearing commenced on October 9, 2001. Additionally, this Court considered the post-certification hearing submissions, motions and arguments. Based on the foregoing, the Court GRANTS plaintiffs' motion based upon the following Findings of Fact and Conclusions of Law:

FACTUAL BACKGROUND

A. Plaintiffs' Claims

Class certifications in Oklahoma are governed by 12 O.S. § 2023. Before proceeding to analyze the requirements of section 2023, it is necessary for the Court to analyze the factual background upon which the plaintiffs' lawsuit rests. In doing so, the Court is cognizant of its role at this stage of the proceedings. As the United States Supreme Court has stated:

> *[N]othing in either the language or history of Rule 23* . . . gives a court *any authority* to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule . . ."

Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974) (emphasis added). This Court, understanding that some discovery needs to be undertaken to understand the nature of the proposed class, has permitted the parties to conduct initial discovery and file extensive evidentiary submissions. Because this Court is heeding Section 2023's requirement that the class certification issue be resolved "as soon as practicable," the Court has endeavored to carefully balance its obligation to conduct a full and complete review of the class issues with the *Eisen's* admonitions that "pre-trial hearings are to be carefully limited" and that "the trial court's guess as to which party would prevail at trial should have no bearing on the allowance or disallowance of a proposed class action." *Eisen v. Carlisle and Jacquelin*, 417 U.S. at 177. Consequently, like the numerous Courts

which have followed Eisen's holding,[1] this Court, while conducting a review of the parties' legal arguments and proposed proof, declines to undertake an examination of the merits of the claims and defenses in connection with a the class determination. What follows is a description of plaintiffs' claims in this litigation.[2]

Defendant DaimlerChrysler is the manufacturer of several types of automobiles called "minivans". The minivans manufactured by DaimlerChrysler include the Chrysler Town & Country minivan, Chrysler Minivan, Plymouth Voyager, Plymouth Grand Voyager, and Dodge Caravan. Each of these minivans is equipped a with passenger side air bag. The named plaintiffs, Sheryl Ysbrand and Mary Cooney, have asserted claims for breach of express warranty, breach of implied warranty of merchantability and breach of implied

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[1] *See Eggleston v. Chicago Journeyman Plumbers*, 657 F.2d 890, 895 (7th Cir. 1981) (citing *Eisen*); *Harris v. General Develop. Corp.*, 127 F.R.D. 658 (N.D. Ill. 1989) ("For the purpose of ruling on plaintiffs' motion for class certification, plaintiffs' allegations are taken as true and the court may not make an inquiry into the merits of the lawsuit."); *Peil v. National Semiconductor Corp.*, 86 F.R.D. 357, 365, 368 (E.D. Pa. 1980) ("The Court, when properly exercising its discretion, may consider the pleadings and facts procured through the discovery process to 'identify the character or type (but not the merits) of plaintiffs claim and-then to determine whether there was a class .... The Court will not engage in a discussion of the merits of the plaintiffs case in relation to this standard. [*Eisen, supra*]").

[2] The Court believes that, while it cannot and should not resolve merits issues, it is important to understand the plaintiffs' claims. The plaintiffs have presented to the Court an outline of their evidence and claims against the defendant. What follows is some of the claims proffered by the plaintiffs. The Court is providing this review to illustrate the nature of the claims—not because it has concluded that the plaintiffs' position is correct. Suffice to say that the defendant vigorously contests the vast majority of the factual claims made by the plaintiffs.

warranty of fitness, all as provided by the Uniform Commercial Code, and fraud in the omission against DaimlerChrysler in the form of a class action suit.

Plaintiffs, Sheryl Ysbrand and Mary Cooney are both owners of DaimlerChrysler minivans equipped with passenger side air bags. Plaintiffs have based their claims on the grounds that the passenger side air bags located in these minivans are defective in nature and/or design based on: 1) their propensity to deploy with overly aggressive force and 2) their propensity to deploy during a low speed collision. Plaintiffs assert that the air bags installed in their minivans are unreasonably dangerous and have, the potential to kill or seriously injure a child or adult of small stature seated in the front passenger seat of their minivans. Plaintiffs have alleged that there now exist air bags which deploy with less force and at higher collision speeds than the air bag originally installed in their vehicle. Plaintiffs have requested that they and the members of the class be compensated in an amount sufficient to allow them to have these allegedly safer air bags installed in their minivans, or in the alternative, that DaimlerChrysler be ordered to establish a national inspection protocol by which each minivan fitting the class definition would be inspected and retrofitted with a newer, safer air bag, as necessary.

Plaintiffs seek to represent a class composed of the following persons:

> "Themselves and all entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia, who purchased and who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one (1) model year 1996-1997 "minivan" automobile marketed by defendant as Chrysler Town & Country or Chrysler Minivan or Plymouth Voyager or Plymouth Grand Voyager or Dodge Caravan, which was manufactured by defendant for sale in any of the fifty states of the United States of America or

> the District of Columbia, or which defendant marketed in any of the fifty states of the United States of America or the District of Columbia as a product of its own manufacture, which was configured at the time of original sale or occupancy by at least five (5) passengers, and which contains on the driver side and/or passenger side of the forward seating area a passive restraint system commonly known as an "air bag," which employs a fabric-covered envelope designed to expand rapidly with sodium azide or other gases and thus cushion a front-seat occupant when the system is activated by a sensor during a frontal collision."

Plaintiffs seek to certify a national class action against DaimlerChrysler for the purpose of litigating all claims extant for the subject airbags in one forum and proceeding.

While two different model years and a number of different names are attached to the subject vehicles, the record in this case establishes that, at the time of manufacture, all of the vehicles in the class contained the same front seat passenger occupant restraint systems. Further, at the time of manufacture, the alleged defects existed in each of these vehicles. In addition, with respect to the front-seat occupant protection systems, the owners manuals were the same.

The defendant has presented evidence that, subsequent to manufacture, some of the vehicles in the proposed class have been involved in accidents that resulted in the replacement of the airbags with a newer, lower powered airbag. The defendant also argue that some potential class members may have not had their airbag replaced after a collision or otherwise had it disconnected. The defendant further notes that some of the class may have had an on/off switch installed in the vehicle. In addition, sometime after the 1996 model vehicles began to be sold, the defendant began to sell the subject vehicles with a different warning label that was subsequently mailed to at least some of the previous purchasers.

CONCLUSIONS OF LAW

A. General Legal Standards Governing Class Certification

Class actions are an "invention of equity" born of the need to provide a procedural device so that large groups of individuals would not be disabled by their sheer number from enforcing their rights. *See* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (2nd Ed. 1986). Because Oklahoma's class action procedure closely mirrors Federal Rule 23, Oklahoma courts are to look to federal law for guidance and enlightenment on class action issues. *See Shores v. First City Bank Corp.*, 689 P.2d 299, 300 (Okla. 1984). The United States Supreme Court has noted that "[c]lass actions serve an important function in our system of civil justice." *Gulf Oil. Co. v. Bernard*, 452 U.S. 89, 99 (1981). This is because class actions permit plaintiffs to "vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." *Deposit Guar. Nat'l Bank v Roper*, 445 U.S. 326, 338, *reh'g denied*, 446 U.S. 947 (1980).

Class certification is a procedural issue that should be resolved expeditiously. The Oklahoma Pleading Code § 2023(c)(1) mandates that the determination of class certification shall be determined "as soon as practicable after the commencement" of the action. In the face of a close question regarding certification, the pragmatically correct action is to sustain certification because, if it develops later during the course of the trial that the order is ill-advised, the order is always subject to modification. *Perry v. Meek*, 618 P.2d 934,940 (Ok. 1980), *citing Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied* 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969).

B. Legal Standard Governing Class Certification

The statutory requirements for maintaining a class action are listed in section 2023 of Title 12 of the Oklahoma Pleading Code. The four prerequisites of Subsection A of

the Oklahoma class action statute are commonly referred to as numerosity, commonality, typicality and adequacy of representation. Each of these requirements will be considered below.

1. **Numerosity.**

Section 2023(A)(1) requires that the proponent of a class action demonstrate that "the class is so numerous that joinder of "all members is impracticable." 12 Okl.Stat.Ann. § 2023(A). The record in this case indicates that there there were at least 1,000,000 minivans produced in the 1996-1997 model years which fit the class definition. This Court recognizes that not all of the minivans produced during this time will still be in service; however, it is reasonable to expect that a very large proportion of these vehicles are still on the road; as only four to five years have elapsed since the time of manufacture. Moreover, this Court finds that it is reasonable to expect that a large portion of the subject minivans still in use today will have the original passenger air bag in place. Daimler-Chrysler has not adduced any evidence to the contrary. The numerosity test is satisfied by numbers alone, when the size of the class is in the hundreds. *Black Hawk Oil Co. v. Exxon Corp.*, 969 p.2d 337 (Okla. 1998). This Court finds that joinder is impracticable due to the sheer volume of minivan owners involved.

Defendants argue that numerosity cannot be established because the class definition requires that an individual inspection occur to determine whether a person is a member of the class which they contend will take over twenty years. The Court rejects this argument. While the Court will exercise its discretion to exclude certain purchasers of the subject vehicles[3] no individual inspection is necessary. The Court can direct notice via publication and/or direct mail to all po-

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[3] *See* Conclusion, *infra*.

tential members of the class and inform them that they are not members of the class if they do not meet the requirements of the class definition. If so, they will know they are not members of the class. For example, if the potential class member has a vehicle with only two seats, they would know this and know that they are excluded. Similarly, those who have had an on/off switch installed also are aware as are the majority of those who have had accidents resulting in airbag deployment. No inspection is necessary to reach this conclusion for the vast majority of the class members. It would only be at the remedy stage that it would be necessary to determine whether a replacement airbag had been installed and that could occur when the vehicle was brought in to be retrofitted.

The Court is not required to leave its common sense at the courthouse steps. From the record in this case it is clear that a class exists and can be defined. Accordingly, the numerosity requirement is satisfied.

2. **Common Questions of Law and Fact.**

Section 2023(A)(2) requires that the proponent of the class action demonstrate that "there are questions of law or fact common to the class." 12 Okl.Stat.Ann. § 2023(A). Section 2023(A) does not require that all questions be common or that common questions predominate. Indeed, in the court's Rule 23(A) inquiry, a single common question is sufficient to satisfy this requirement. *See Perry v. Meek,* 618 P.2d 934 (Ok. 1980).

A common question is one which "arises from a common nucleus of operative facts regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants. *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 690-91 (E.D. Pa.. 1977). Indeed, the presence of *one* common question of law or fact is sufficient to certify a class. *Perry v. Meek;* 618 P.2d 934 (Okla. 1998); *In re: Prudential Ins. Co. of America Sales Practice Litigation Agent Action,* 148 F.3d 283, 310 (3rd Cir. 1998); *Stewart v. Winter*, 669

F.2d 328 (5th Cir. 1982); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978).

Plaintiffs have argued that commonality exists among the class members because the claims of each potential class member relate to the installation of an allegedly dangerous air bag in their minivan, and the act of withholding this information from the vehicle owners by DaimlerChrysler. Plaintiffs argue that the questions of law and fact common to the class include:

1) Whether the air bags installed in the minivans sold to the named plaintiffs and members of the class are defective and unreasonably dangerous for their intended use;

2) Whether defendants adequately warned named plaintiffs and members of the class of the alleged defects and dangers inherent in their minivans, airbags systems prior to sale;

3) Whether defendants deliberately withheld from named plaintiffs and the members of the class vital information regarding the dangerous characteristics of the air bags systems installed in their minivans;

4) Whether plaintiffs have been harmed economically by being forced to bear the cost of retrofitting their minivans with air bags, related sensors and electronic components, and by being required to absorb the diminution of value in resale of their vehicle, as well as its diminished utility.

Plaintiffs aver that the central issue for all class members is whether or not the air bags originally installed in their minivans are unreasonably dangerous. It is this determination that will ultimately decide whether plaintiffs' claims have merit. Plaintiffs argue that their claims against DaimlerChrysler arise from the same set of alleged operative facts, i.e., the installation of the air bag in their vehicle and the act of withholding safety related information from them. Plaintiffs contend that none of the class members were ever in-

formed about the true nature of their defective airbags. Thus, the operative facts present give rise to claims against DaimlerChrysler that are common to the entire class. A determination regarding whether the subject air bags installed in the Plaintiffs and other members of the class vehicles are unreasonably dangerous, and whether DaimlerChrysler withheld that information from the Plaintiffs and members of the class are the issues to be determined. The resolution of these issues will be applicable to each and every class member and will be dispositive of every class member's claims. However, it is the opinion of this Court that forcing thousands of individuals to file identical individual actions would burden the courts of this state (and every other state) unnecessarily if, and it is unlikely, those individuals discovered their legal rights and retained counsel. This Court finds that, given the presence of questions of law or fact common to the plaintiffs and members of the class, the requirement for the existence of common questions of fact or law is satisfied.

3. Typicality

Section 2023(A)(3) requires that the proponent of the class action demonstrate that the claims or defenses of the representative parties are typical of the claims or defenses of the class. 12 Okl.Stat.Ann. § 2023(A). The measure of whether a plaintiffs claims are typical is whether the nature of plaintiff's claims, judged from both a factual and legal perspective, are such that in litigating his personal claims, he can reasonably be expected to advance the interest of absent class members. See *Lobo Explorations Co. v. Armoco Productions*, 1999 OK CIV APP 112, 991 P.2d 1048, 1055. "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Id.* (quoting *Alpern v. UtiliCorp United Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996)).

The plaintiffs have argued that their claims against DaimlerChrysler arise out of the same course of conduct (*i.e.*, installation of unreasonably dangerous air bags and withholding of information regarding the safety of these air bags), and

are based on the same legal theories as those of the class (breach of UCC warranties and fraud). Both Ysbrand and Cooney own 1996-1997 minivans equipped with the allegedly defective air bags, as do all prospective members of the class. The central issues in this case are whether the subject air bags are unreasonably dangerous due to either their nature or an inherent design defect so as to be unfit for their intended use, and whether DaimlerChrysler intentionally withheld knowledge of the dangerous nature of the air bags from consumers. The question of whether the subject air bags are dangerous due to either their nature or an inherent design defect is one common to all class members, as these air bags were installed in minivans covered by the class definition. Additionally, the question of whether DaimlerChrysler withheld information regarding the allegedly dangerous air bags from the class members in general is one that is also common to the class. If Ysbrand and Cooney prevail on their claims, the class will benefit from the determination. Likewise, if DaimlerChrysler prevails, the class will also be bound by that determination. This is precisely the type of situation envisioned by the legislative branch, wherein a class action effectively and efficiently resolves issues common to many with efficient utilization of judicial resources.

The defendants have identified certain defenses that they contend destroy the commonality of the class representatives' claims. The Court has reviewed these claims and finds that, to least at this stage, the defendants have failed to establish that these alleged differences are sufficient to destroy the commonality of the class.

The common issues presented here are such that in litigating the liability issues, the representative plaintiffs may reasonably be expected to advance the interests of all class members toward a favorable determination with respect to each such issue. Therefore, this Court finds that the claims of the representative plaintiffs are typical of the claims of the class.

4. The Plaintiff will Fairly and Adequately Protect the Interests of the Class.

The adequacy inquiry focuses on whether the representative parties will fairly and adequately protect the interest of .the class. *Blackhawk v. Exxon*, *supra* 969 P.2d 337. This requirement is met if (1) plaintiffs attorneys are qualified, experienced and generally able to conduct the litigation and (2) plaintiffs interests are not antagonistic to those of the class he seeks to represent. See, e.g., *Prudential*, 148 F.3d at 312; *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982).

It is evident that plaintiffs have retained counsel highly experienced in class action litigation to prosecute their claims. All counsel for plaintiffs have been appointed class counsel in successful consumer litigation in numerous states, including the State of Oklahoma. Some of the counsel for the plaintiffs have previously practiced before this Court on several occasions regarding class issues. In addition, the curriculum vitae submitted by class counsel evidence the experience necessary to competently litigate this matter. Therefore, this Court finds that the first prong of the adequacy inquiry has been satisfied.

Second, there is nothing in the record to suggest that either Ysbrand or Cooney have any interests antagonistic to the claims advanced on behalf of the class. To the contrary, their depositions demonstrate that they are familiar with the claims advanced in this litigation and are fully prepared to vigorously pursue the litigation on behalf of the class.

The defendants argue that plaintiffs have failed to keep their clients adequately informed as to the facts of this case. Reviewing the record of the plaintiffs' depositions as a whole, the Court finds that the plaintiffs have been adequately informed as to the nature of the litigation and their responsibilities as class representatives. Plaintiffs who seek

to be class representatives do not need to be attorneys or have an attorney's knowledge of the litigation.[4]

This Court believes the representative Plaintiffs will adequately represent the interests of the Class, and have no interests antagonistic to the Class they seek to represent; therefore, this Court finds that the adequacy requirement of § 2023(A) has been satisfied.

With respect to the requirements of § 2023(B), plaintiffs seek certification of an "opt out" class with regard to the "damages" claims pursuant to § 2023(B)(3), which states that certification is appropriate when:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (a) the interest of the members of the class in individually controlling the prosecution or defense of separate actions,
>
> (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,
>
> (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

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[4] Similarly, the Court rejects the defendants' contention that plaintiffs were improperly solicited. The Court has thoroughly reviewed the facts concerning the plaintiffs' decisions to bring this action and finds no actions on the part of counsel that amount to improper solicitation.

(d) the difficulties likely to be encountered in the management of a class action.

Okla. Stat. Ann. Tit. 12 § 2023(B)(3) (1991).

This subsection requires that two basic findings be made: (1) that common questions of law and fact predominate (commonly referred to as "predominance"); and (2) that a class action is superior to other forms available for fair and efficient adjudication (commonly referred to as "superiority"). Okla. Stat. Ann. Tit. 12, § 2023 (1991); *Lobo Exploration Co. v. Amoco Productions*, 991 P.2d at 1052. Both findings simply call for a qualitative and relative analysis of the case. *See Matton v. City of Norman*, 1981 OK 92; 633 P.2d 735, 739 (Predominance "is a qualitative rather than a quantitative matter").

Those members of the Class interested in pursuing their own actions have the right and ability to do so under a (B)(3) certification. Thus, the inquiry becomes a pragmatic one which asks whether there are enough common questions to justify a common adjudication. *Copley*, 158 F.R.D. at 491. The plaintiffs have argued that both predominance and superiority are satisfied in the case at hand, and that this case is due to be certified pursuant to § 2023(B)(3). The Court agrees.

Predominance of Common Questions of Law and Fact

The Court in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), examined predominance and held that "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, and focuses on the relationship between the common and individual issues." 150 F.3d at 1022 (citations omitted). In the case *sub judice*, Ysbrand, Cooney and the class members all had passenger side air bags installed in their DaimlerChrysler-manufactured minivans; if they did not, or no longer have such an air bag present in their minivan, they are not members of the class. If the Plaintiffs prevail on the merits and establish that these air bags are unrea-

sonably dangerous, then it follows that each of these minivan owners and/or their passengers are being exposed to unreasonably dangerous air bags each time they use the vehicle. Thus, the question of whether the subject air bags are unreasonably dangerous will predominate over questions affecting only individual members; if the air bags are not unreasonably dangerous, no minivan owner will have a viable claim. Since each class member has the same allegedly defective air bag, there exist no individual questions.

The question of whether the subject air bags are dangerous is the threshold question when addressing Plaintiffs claims for fraud as well. To prevail on their claim for fraud based on DaimlerChrysler's alleged acts of withholding information regarding the safety of the subject air bags, Plaintiffs will have to first prove that the subject air bags are, in fact, unreasonably dangerous. If they, fail to prove this, their claim for fraud must also fail. In addition, Plaintiffs must show that their claim for fraud will not entail individual questions of fact that predominate over those questions common to the class.

Plaintiffs have made a claim against DaimlerChrysler for consumer fraud based on silence or omission. Plaintiffs have not claimed that DaimlerChrysler misrepresented any particular fact regarding the subject minivans to them in an individual setting. For example, Plaintiffs do not claim that a representative of DaimlerChrysler misrepresented the true nature of the air bags to them at any particular time and place; indeed, it has never been claimed by either party that the Plaintiffs or any member of the class has ever met a representative of DaimlerChrysler before or after purchasing their minivan. As such, it is the opinion of this Court that individual questions regarding the facts and circumstances of the acts constituting fraud are not extant in the case *sub judice*, as would be the case in many traditional claims for fraud. Thus, the type of claim set forth by Plaintiffs against DaimlerChrysler for failing to inform the public as a whole of the dangers inherent in the passenger side air bags located in their minivans will not necessitate the type of individual factual inquiry which would

necessarily predominate over common questions. This Court finds that the questions of law and fact common to the class will predominate over questions affecting only individuals, and the requirement of § 2023(h)(3) is satisfied.

Defendant also argues that the need to apply different states' laws destroys the predominance finding. The plaintiffs and the defendants have each presented an indepth analysis of the choice of law issues. The plaintiffs have also presented a number of decisions where the court, in similar cases, has found. the predominance requirement met despite the choice of law problems. After reviewing these the Court concludes that the alleged choice of law problems identified by the defendants does not bar certification. The Court notes that most recently, the United States District Court in Indiana certified national clauses against these same objections regarding the Firestone Tire/Ford Explorer claims nationwide. See *Bridgestone/Firestone, Inc. Tires Product Liability Litigation*, ___ F.Supp.2d ___ (SD. Ind. November 28, 2001); see also Plaintiffs' Supplemental Submission Regarding Defendant's Motion to Dismiss (citing and attaching cases).

A Class Action as the Superior Method for Adjudication

In assessing superiority, courts acknowledge that case management challenges may flow from a grant of class certification. However, courts also recognize that the broad discretion vested in the trial court, by § 2023 provide the framework and flexibility to meet such challenges. See, Okla. Stat. Ann. Tit. 12 § 2023(C) (1991). The ability of the class action device to bring all claimants together for adjudication of their common issues in a single proceeding far outweighs the logistical demands of class treatment, particularly since the class mechanism "reduces the systemic burden" on the court system and litigants by reducing the time and costs which must otherwise be spent in replicating the same case many times over. *Copley*, at 473.

The named plaintiffs aver that DaimlerChrysler owes the class members either appropriate compensation for the cost of retrofitting their vehicles with safe air bags, or the opportunity for each class member to have their minivan inspected to determine if the subject air bag is present in their vehicle and, if so, to have it replaced by DaimlerChrysler at no personal cost.

DaimlerChrysler has argued at length that the costs, both monetary and in time, of inspecting and retrofitting, when necessary, each minivan within the class definition would make class action treatment unworkable. This Court finds such argument to be without merit. Throughout recent history, automobile manufacturers have voluntarily recalled hundreds of thousands of vehicles for the purposes of rectifying some defect therein without incurring the astronomic costs in time and money described by DaimlerChrysler. In fact, exactly such a situation existed in the *Hanlon* case. In *Hanlon*, DaimlerChrysler was ordered to redesign and replace the rear latch on various model minivans. This was accomplished by having a minivan owner bring their minivan to a DaimlerChrysler dealership where a newly designed rear latch was installed. If the plaintiffs are successful, this Court sees no reason why a similar procedure could not be established in the case at hand.

It has been argued by the plaintiffs that the cost of retrofitting a minivan with a new air bag will range from three to five hundred dollars. DaimlerChrysler has not disputed this calculation. It is not conceivable that an individual plaintiff would bring suit, or even be able to find an attorney willing to handle a case with such a low potential recovery, on his/her own behalf. As such, it is clear that most individual claims are not sufficiently substantial to support individual litigation, a factor in support of plaintiffs' argument that a class action is superior to other means of adjudication.

The alternatives to a class action are either no recourse for tens of thousands of vehicle owners, or even in the unlikely event that they all become aware of their rights and

could locate counsel, a multiplicity of scattered suits resulting in the inefficient administration of litigation. See, *Firestone v. Penn Central Corporation*, No. 29D03-9210-CP-500 (Sup. Ct. Ind. April 15, 1998).

DaimlerChrysler has also argued that the class would be unmanageable because the individual issues will swallow any efficiencies derived from common adjudication. Specifically, DaimlerChrysler has argued that the individual factual inquiry and associated time and expense necessary to establish the existence of the original air bag in any given minivan will serve to diminish the desirability of class management. But the presence of potential individual issues does not automatically render a class unmanageable. *Perry v. Meek*, 1980 OK 151, 618 P.2d 934, 938 (fact that judgment may differ in amount as to individual members does not defeat right to class relief). It will not be the individual minivan owner's burden to establish the presence of the minivan's original air bag. It is DaimlerChrysler who will inspect the vehicle, determine if the original air bag is present, and retrofit it with a new air bag if necessary. As DaimlerChrysler has done in *Hanlon* and many other cases in the past, DaimlerChrysler, as the manufacturer, will bear the burden of identifying and replacing faulty air bags in the event of an adverse ruling.

The defendant contends that administrative remedies are superior to plaintiffs' claims. The premise of this argument is that these remedies preempt plaintiffs' claims, an argument that the Court has rejected in denying defendant's motion to dismiss. In addition, the Court finds that the same problems with pursuing individual remedies will exist if administrative remedies are pursued by individual class members. Finally, the Court finds that the common law and statutory remedies advanced by plaintiffs are broader and potentially superior to those provided by the administrative regulations.

CONCLUSION

Because this Court finds that class certification will provide a just, speedy, and inexpensive determination of this

case, and because plaintiffs' request complies with section 2023 of Title 12 of the Oklahoma Pleading Code, the plaintiffs Motion for Class Certification is GRANTED.

The Court believes that it important to note the scope and nature of plaintiffs' certification request and this ruling. The plaintiffs have not requested that the Court try every facet of each claim in this case on a class basis. Nor must the Court do so in order to certify a class. Instead, the Court FINDS that it can and will certify the case as a class action, and through § 2023(c)(4), determine and try the common issues and the common claims on a class basis and address the individual issues in either single or consolidated trials should that be necessary. The Court notes that Section 2023(c)(4) explicitly authorizes this procedure:

> When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

The Court, however, declines at this time to decide the scope of any Rule 23(c)(4) subclasses. In the exercise of its discretion, the Court HOLDS that it will defer identification of any subclasses until after the class has been notified. Opt outs by class members and other information received during the notice process will allow the Court to more accurately evaluate the need for and the exact contours of any subclasses. The supposed problems noted by the defendants in their attack on typicality, if they do arise, can be addressed at that time. Moreover, the need for further trials, etc., can also be more accurately established. In *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156 (S.D.W.Va. 1996), Judge Haden adopted this course noting:

> Plaintiffs also seek certification of certain subclasses. The court concludes the suggested division is premature. The better course is to withhold a decision on subclass certification pending responses, if any, to the notice mandated by Rule 23(c)(2).

173 F.R.D. at 157 n.l. Similarly, in *Merk v. Jewel Food Stores*, 702 F.Supp. 1391 (N.D.Ill. 1988), the Court followed this course of action:

> Rule 23 provides specific mechanisms, such as the certification of subclasses, 23(c)(4), as well as a general authorization to "prescrib[e] measures to prevent undue repetition or complication." Rule 23(d). Courts have not been reluctant to devise a litigation procedure that allows a class action to proceed despite early perceived certification problems as long as all of the requirements of Rule 23 are ultimately satisfied at later stages in the litigation. Thus, a court may delay narrowing the class by fashioning appropriate procedures, such as a split trial, and deferring the disposition of uncommon issues. Newberg, Herbert B., Newberg on Class Actions, § 9.47 (2d ed. 1985). This is especially prudent when the disposition of the common issues may obviate the need to resolve those issues that affect only a subset of the class. Id., § 953 at 320, §§ 9.63 et seq. If at a later point in the litigation it is apparent that modification of the class is necessary or advised, the court may then exclude certain members or certify a subclass. *Bryan v. Amrep Corp.*, 429 F.Supp. 313 (S.D.N.Y. 1977)

Id. at 1395; *see also Heastie v. Community Bank*, 125 F.R.D. 669 (N.D. Ill. 1989) ("Thus, it may be appropriate to divide the class members into subclasses, depending on which contractor they dealt with, but we can defer a decision on this matter to a later date.").

The Court hereby CERTIFIES the following class against all defendants:

> All entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia, who purchased and who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one (1) model year 1996-1997 "minivan" automo-

bile marketed by defendant as Chrysler Town & Country or Chrysler Minivan or Plymouth Voyager or Plymouth Grand Voyager or Dodge Caravan, which was manufactured by defendant for sale in any of the fifty states of the United States of America or the District of Columbia, or which defendant marketed in any of the fifty states of the United States of America or the District of Columbia as a product of its own manufacture, which was configured at the time of original sale or occupancy by at least five (5) passengers, and which contains on the driver side and/or passenger side of the forward seating area a passive restraint system commonly known as an "air bag," which employs a fabric-covered envelope designed to expand rapidly with sodium azide or other gases and thus cushion a front-seat occupant when the system is activated by a "sensor during a frontal collision.

Excluded from the class are those persons who were excluded from the definition set forth in plaintiffs' petition including (a) those who have suffered a personal injury as a result of the airbag deployment; (b) Chrysler employees and affiliates; and (c) judges and judicial personnel. Petition at ¶¶ 11, 68, & 69.

After carefully considering the arguments raised by the parties, the Court excludes those who have had their airbags deactivated (either by an on/off switch or otherwise) and those who have had the original equipment airbags in their vehicles replaced.

The Court hereby appoints the following law firms as Class Counsel for the plaintiffs and the class: James Minge of James Minge & Associates, Patrick W. Pendley of, Pendley Law Finn, Anthony J. Majestro of Masters & Taylor, L.C., Darleen Jacobs of Law Offices of Darleen Jacobs, Jerry McKernan of Mckernan Law Firm, Robert E. Reeves of Reeves Law Office, and Harry Scoufos of Law Offices of Harry Scoufos, P.C.

The Court notes that this certification, like all class certifications, is conditional and may be reconsidered if the sane proves to be improvident.

The Court, having fully considered the positions of all the parties, notes the complete objection and exception to any party to any ruling that is adverse to that party.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTERED this 14th day of Feb, 2002.

/s/
DISTRICT JUDGE

[Seal Omitted]

APPENDIX C

Rec'd (date)	11-6-03
Posted	PE
Dated	PE
Distrib	PE
Publish	yes X no

FILED
SUPREME COURT
STATE OF OKLAHOMA
NOV 6 2003

MICHAEL S. RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, November 6, 2003

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDER OF THE COURT:

97,469 Sheryl Ysbrand and Mary Cooney, individually and on behalf of all others similarly situated v. Diamlerchrysler Corporation, individually and as successor in interest to Chrysler Corporation, a Delaware corporation.
Petition for rehearing is denied.
CONCUR: Opala, V.C.J., Hodges, Lavender, Summers, Boudreau, JJ.
DISSENT: Watt, C.J., Hargrave, Kauger, Winchester, JJ.

99,087 Graham John Geary v. Beverly Darlene Geary.
On notice that appellee has filed for bankruptcy protection under Chapter 7 of United States Bankruptcy Code, this appellate pro-

ceeding is stayed by operation of the automatic stay of 11 U.S.C. § 362. The parties to this appeal are directed to report any matter arising in the course of the bankruptcy which may affect the continued operation of the automatic stay and shall file a report advising this court of the general status of the bankruptcy proceeding by March 6, 2004.

99,430 Joe Womack, Guardian Ad Litem for Georgette Rosa Gomes, an Incompetent Person v. HCA Health Services of Oklahoma, Inc. etc, et al.
Parties may proceed before trial court to resolve controversy regarding proper contents of record.

99,432 Estate of Llar Hicks, et al., v. Urban East, Inc., et al.
Respondent is granted leave to file a combined brief of fifty (50) pages in length by December 15, 2003.

99,941 Paula Stites v. Lee Huneryager Ward
Appellee may proceed before trial court to resolve controversy regarding exhibits and proper contents of designation of record. Appellant is cautioned that failure to advance costs may result in dismissal of appeal.

/s/
CHIEF JUSTICE

APPENDIX D

The Fourteenth Amendment to the federal Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

APPENDIX E

The Commerce Clause of the federal Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

APPENDIX F

IN THE DISTRICT COURT IN AN FOR
SEQUOYAH COUNTY
STATE OF OKLAHOMA

SHERYL YSBRAND and MARY COONEY, individually and on behalf of all others similarly situated, Plaintiffs,	)	[Filed August 7, 2000]
v.	)	Case No. CJ-00-643
DAIMLERCHRYSLER CORPORATION, a Delaware Corporation, individually and as successor in interest to, CHRYSLER CORPORATION, a Delaware Corporation, individually, Defendants.	)	

PETITION

Plaintiffs, Sheryl Ysbrand and Mary Cooney, individually and on behalf of all others similarly situated, file their Class Action Petition and, in support thereof, state as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Sheryl Ysbrand is an adult resident of Sequoyah County and the State of Oklahoma and the owner of a 1996 Chrysler Town & Country minivan designed, manufactured, warranted, advertised, sold, and distributed by Chrysler Corporation ("Chrysler").

2. Plaintiff Mary Cooney is an adult resident citizen of New Castle County and the State of Delaware and the owner of a 1996 Chrysler Town & Country minivan designed, manufactured, warranted, advertised, sold, and distributed by Chrysler.

3. Defendant DaimlerChrysler Corporation ("DaimlerChrysler") is a Delaware corporation with its principal place of business in the State of Michigan. DaimlerChrysler is the successor in interest to Chrysler with respect to the vehicles at issue in this litigation. DaimlerChrysler may be served with process upon its registered agent Corporation Company, 735 First National Building, Oklahoma city, Oklahoma, 73102.

4. Defendant Chrysler is a Delaware corporation with its principal place of business in the State of Michigan. Chrysler may be served with process upon its registered agent Corporation Company, 735 First National Building, Oklahoma City, Oklahoma, 73102.

5. At all relevant times, each defendant was the agent, servant, or employee of the other Defendant and in acting and/or omitting to act as alleged in this Complaint did so within the course and scope of that agency or employment. Each defendant is sued individually as a co-conspirator and aider and abettor. Defendants knowingly

and/or recklessly conspired in, and/or aided and abetted, the common course of conduct set forth in this complaint.

6. This Court has subject matter jurisdiction over the claims set forth in this Petition, as the claims do not arise out of federal law. Further plaintiffs state that each individual plaintiffs claim does not exceed the sum of $75,000.00, exclusive of interest and costs. The plaintiffs seek no punitive damages, injunctive relief, attorney fees or any damages from the defendants to the extent that to do so would cause the amount in controversy in this action to exceed the sum of $75,000 exclusive of interest and costs, and to the extent that it may be construed to include such claims, the same are expressly disclaimed.

7. The plaintiffs seek no relief under any federal laws or regulations, assert no federal claims, and withdraw any asserted state claim that is completely preempted by federal law such that the claim would confer federal question jurisdiction. The claims herein are brought solely under state common and state statutory law. Any and all claims or possible claims under any federal law, code, regulation, rule, and/or otherwise are expressly not brought herein and are disclaimed.

8. The United States District Court *does not* have subject matter jurisdiction over this action as this case does not arise out of the constitution or laws of the United States, as there is not complete diversity of citizenship between the parties, and as the amount in controversy does not exceed the sum of $75,000.00, exclusive of interest and costs.

9. This Court has personal jurisdiction over the plaintiffs' claims against these defendants as they are licensed to conduct and are conducting business in this State and this judicial district, and as this action accrued in whole or in part in this State and this judicial district.

FACTUAL INTRODUCTION

10. This is a class action by purchasers of 1996 and 1997 automobiles described as minivans and marketed under

the names such as Chrysler Town & Country, Chrysler Minivan, Plymouth Voyager, Plymouth Grand Voyager and Dodge Caravan, manufactured by Chrysler for sale in the United States (hereinafter "vehicles" or "minivans") which contain a front passenger passive restraint device commonly known as an airbag. The airbags in these minivans, as manufactured and sold by defendants, are defective in that they are unreasonably unsafe because the devices themselves cause injuries and/or fatalities that would not have otherwise occurred.

11. This is not a personal injury action, and any and all claims for personal injury or wrongful death are hereby expressly excluded from the claims herein. Plaintiffs seek economic damages compensating them for the cost to repair their vehicles, diminution in value of their vehicles, and or other damages as provided by law.

12. At all times material hereto, defendants were engaged in the business of designing, engineering, testing, assembling, manufacturing, marketing as products of its own manufacture and placing into commerce the minivans. With respect to the model years 1996 and 1997, each of these vehicles was equipped with identical or similarly designed front-seat passenger airbag.

13. Beginning in 1990, defendant, like all other automobile manufacturers, began to be obligated by Federal Motor Vehicle Safety Standard No. 208 ("FMVSS 208") as promulgated by the National Highway Transportation Safety Administration ("NHTSA"), to install in its new vehicles intended for sale in the United States, "automatic crash protection" for front-seat occupants.

14. "Automatic crash protection" was defined by FMVSS No. 208 as either three-point seat belts which secure front-seat occupants automatically upon entering the vehicle, or airbags which protect from serious "injury" in a "Delta V" 30 mph frontal collision with an immovable barrier, an unbelted fifty percentile adult male crash test dummy weighing

approximately 165 pounds and measuring approximately 5'9" in height.

15. Apart from specifying this minimum performance requirement, the National Highway Traffic Safety Administration did not suggest or mandate any particular airbag design, or suggest or mandate the "Delta V," velocity or force at which airbags should deploy.

16. Initially, airbags were commonly included as protection for vehicle drivers. Starting with vehicles manufactured in the 1993 model year, defendants began to manufacture, market and sell passenger vehicles with airbags that were marketed as protecting front-seat passengers.

17. The passenger airbags in defendants' minivans were designed by defendants to deploy and do in fact deploy at speeds up to 200 miles per hour with forces up to 2,000 pounds in frontal collisions with a "Delta V" as low as 8-10 miles per hour, that is, at a speed at which but for the deployment of the airbags serious injury or death would not likely occur.

18. The safe speed and force of the deployment of the passenger airbag depends on several factors including the size of the vehicle, the age, size, and weight of the passenger, the passenger's position, whether or not the passenger is wearing a seatbelt, and the severity of the collision. Defendants' passenger airbags in their 1996-1997 minivans do not distinguish between these factors and instead, always deploy optimized for a severe crash with an unbelted 160 pound male properly seated in the passenger position.

19. At all times material hereto, defendant was aware that as a general rule the risk of serious injury or death to front-seat passengers increases in direct proportion to the airbag's force and velocity of deployment, the front-seat occupant's proximity to the airbag module during deployment, and the airbag's "excursion distance," that is, the horizontal distance which the airbag travels during expansion from its housing module towards the occupant.

20. The overwhelming majority of airbag-related injuries and deaths occur either when the victim is struck by the airbag as the airbag is expanding, or when the victim's forward momentum compresses the airbag and causes the airbag to catapult the victim backwards with great force. Moreover, women, children, adults of small stature, the elderly and the infirm are especially vulnerable to airbag-related injury and death. At all times material hereto, defendant was aware of these facts.

21. Unbeknownst to plaintiffs and the class, at risk front seat passengers were particularly vulnerable to airbag-related injury and death when they were passengers in defendants' minivans.

22. According to a Safety Study published by the National Transportation Safety Board, from 1993 through mid-September 1996 at least twenty-nine (29) young children were killed or critically injured as a result of the deployment of passenger-side airbags in automobiles of all makes and models in collisions which the children would have otherwise survived.

23. Of these twenty-nine deaths and critical injuries, the National Transportation Safety Board attributes eight (8) to airbags installed in defendant's minivans.

24. Defendant's minivans represented 45-50% of the total minivan sales in the United States during this period, yet its minivans were involved in 100% of the minivan airbag-related deaths of young children.

25. Serious injuries and deaths have also been suffered by significant numbers of adults as the result of airbag-deployment in defendant's minivans on both the driver side and the passenger side.

26. Chrysler, along with the rest of the American auto industry spent almost twenty years opposing airbags. After years of opposing mandatory airbags, however, defendants discovered that the industry had failed to convince the public that airbags were undesirable. Indeed, marketing research

revealed that the public desired safer vehicles and were willing to pay more for vehicles considered safer. Thereafter, defendants marketed their minivans that were equipped with passenger airbags as safer vehicles.

27. With respect to defendants' minivans, which are classified by the National Highway Traffic Safety Administration as "light trucks" to which separate FMVSS 208 requirements apply, defendants were not required to equip their pre-1998 model year minivans with passenger airbags of any sort. However, based upon their marketing research, defendants made the conscious decision to include passenger airbags to increase vehicle sales.

28. Prospective purchasers of defendants' minivans were directed to the passenger airbag, and the fact that defendants were voluntarily including the passenger airbag, as evidence of the defendants' commitment to manufacturing and selling "safe" minivans. Thus, defendants used the fact that the vehicles contained the passenger airbag in order to increase sales of their vehicles and increase their profits.

29. No government regulation required the defendants to market the passenger airbags in the manner in which they did. Nor did any government regulation prohibit the defendants from informing the public of the known dangers of passenger airbags.

30. Notwithstanding that defendant marketed its airbag-equipped minivans as "family vehicles," Chrysler did not test the safety of its airbag systems prior to manufacture using child-sized anthropomorphic crash test dummies.

31. The defendants' choice to market these vehicles with defective passenger airbags to precisely the population most at risk was made despite the existence of safer passenger airbag designs. Airbag designs that vary either the decision to deploy or the force of the deployment with the severity of the crash or the characteristics of the passenger exist and have existed since the 1970s. Instead of using these safer designs, defendants adopted a one-size-fits-all approach to their passenger airbags that incorrectly assumed that any pas-

senger airbag that satisfied NHTSA's standard optimized for a severe crash with an unbelted 160 pound male properly seated in the passenger position was sufficient despite the fact that it had the propensity to kill or injure the very population to whom the minivans were being marketed.

32. In addition to safer airbag designs, defendants' minivans were designed without simple safety features in the passenger compartment which would have made the defendants defective airbags safer. Simple modifications to the seatbelt retractors, the dash board configuration, the method of folding the airbag, the type of gas used to inflate the airbag would have made the airbag safer to the passengers in said vehicles, among other things.

33. While this decision may have decreased their costs and increased defendants' profits, it was not required by technological limitations.

34. Indeed, one of defendant DaimlerChrylser's subsidiaries, Mercedes Benz, predecessors, Daimler-Benz, had well before the 1996-1997 model years adopted safer airbag designs sometimes now known as "smart airbags" or "second generation [sic] airbags."

35. In addition, defendants' failure to implement so-called "smart airbags" had nothing to do with federal regulation. The safer designs, available for decades, have always complied with every applicable government standard. Indeed, because the federal government's crash standards during the relevant years are performance based, government regulation encouraged and facilitated the development and installation of smart airbags. Chrysler, in a twisted attempt to create the impression that its minivans were safer than competitors' products, opted to market their minivans containing passenger airbags as safety advances while using cheaper and more dangerous passenger airbag designs.

36. Defendant's minivans are defective and unreasonably dangerous for their normal intended used for the following non-exclusive reasons:

a. Their airbags, related sensors and electronic components were designed to deploy with terrific velocity and force irrespective of front-seat occupant position, height, weight, physical condition or age, thus exposing to the risk of serious injury or death to children, women, adults of small stature, the elderly, the infirm, and persons who are either out of position or seated closer than optimal to the airbag module at the instant of deployment.

b. Their airbags, related sensors and electronic components were designed to deploy with a single and unreasonably dangerous velocity and force even in minor frontal collisions, thereby exposing front-seat vehicle occupants, particularly but not limited to children, women, adults of small stature, the elderly, the infirm and out-of-position adults, to the risk of injury or death which they would not otherwise suffer.

c. Many of their airbags were manufactured without internal tether straps or other devices designed to shape the airbag as it expands or otherwise limit the airbags' excursion distance, and thereby minimize the likelihood of a front-seat occupants body coming into contact with the airbag during the airbag's expansion, or of a front-seat occupant being catapulted backwards after the airbags full deployment.

d. Their airbags, related sensors and electronic systems were not designed to take into consideration prior to deployment the height, weight or proximity to the airbag of the front-seat occupants towards whom the airbags were designed to deploy.

e. Their airbags, related sensors and electronic systems were not designed to take into consideration prior to deployment whether seatbelts are in use by the front-seat occupants towards whom the airbags were designed to deploy, and are therefore unnecessarily aggressive to belted occupants.

f. Even though such technology was developed by General Motors Corporation in the 1970's and was at all times material hereto available to defendant, the airbags, related sensors and electronic components installed in defendant's minivans were not designed to adjust the velocity or force of airbag expansion to the severity of the collision.

g. Their airbags, related sensors and electronic components are set to deploy with maximum velocity and force at an unreasonably low "Delta V."

h. Their airbags, related sensors and electronic components do not include sensors in the front seats which automatically adjust the velocity and force of airbag expansion and/or adjust the "Delta V" at which deployment occurs, according to the occupant's height, weight and/or distance from the airbag module.

i. Their seat tracks permit occupants to move their seats unwittingly into dangerous proximity to the airbag module.

j. Their seatbelts do not have "pretensioners" which, upon sensing an impending frontal collision, restrain a front-seat occupant from moving forward into the airbag's excursion zone and thus minimize the likelihood that a front-seat occupant's body will come into contact with the airbag as the airbag expands,

k. Their airbag modules are not sufficiently recessed into the dashboard to minimize the likelihood that a front seat occupant's body will come into contact with the airbag as the airbag expands.

l. Their airbag systems include unreliable mechanical sensors.

m. Their method of folding the airbags unnecessarily delays full expansion, and thus fails to minimize the likelihood that a front-seat occupant's body will

come into contact with the airbag as the airbag expands.

n. Their airbag modules are positioned on the passenger side so as to "aim" the airbags' greatest force during expansion directly at the bodies of front-seat occupants.

o. Their airbags are propelled by "hot gases" such as sodium azide, rather than compressed "cold gases," which cause the airbags to deploy with unnecessary and dangerous velocity.

p. All other defects and unreasonable dangers to be proved at trial.

37. The National Highway Transportation Safety Administration, apart from mandating in 1993 a sunvisor warning label in contrasting colors which states that a front seat occupant should not "sit or lean unnecessarily close to the airbag," left to defendant's discretion the wording, placement and means of communicating warnings of the dangers and risks mentioned hereinabove. ["The manufacturers are free, of course, to provide additional information in other places." Vol. 58 No. 169 Fed.Reg. at 46554].

38. Even this minimum sunvisor warning appears in defendants' minivans in black letters on a gray background, rather than in contrasting colors as mandated by law.

39. Defendants, who at all times material hereto knew of the dangers and defects inherent in the airbags, related sensors and electronic components installed in its minivans, failed to give plaintiffs adequate warnings (either orally or in writing) of the defects prior to sale.

40. If prior to sale defendant had warned plaintiffs of the defects and dangers inherent in the airbags, related sensors and electronic systems installed in defendant's minivans, plaintiffs would have negotiated a lower price, or purchased vehicles without one or more of the airbags, or purchased vehicles equipped with less dangerous airbag systems.

41. As a result of defendants' acts and omissions, plaintiffs and the class members have unknowingly been misled into purchasing vehicles that were designed and marketed for occupancy by front seat passengers and are now unsuitable for occupancy by large numbers of the American population.

42. For at least twenty-five years, defendant has possessed the technology to simply and inexpensively eliminate or significantly reduce the risks to front-seat occupants described hereinabove without significantly interfering with the airbags' original purpose of protecting the FMVSS No.208 prototypical adult male and other front-seat occupants in frontal collisions of thirty miles per hour or more, yet defendant failed to do so during the years at issue solely to cut costs and increase profits.

43. It was at all times material hereto economically and scientifically feasible and practical to eliminate or significantly reduce the defects and dangers described hereinabove without violating or thwarting the purpose or intent of any safety standard, state or federal law.

44. The defendants' actions constitute breaches of the duties owed to the plaintiffs and class members under the applicable laws of the States of Oklahoma and Delaware as set forth below. In addition, the claims of the plaintiffs and class members are based on uniform state laws and/or common law theories that, in all material respects, impose the same duties on defendants and/or provide the same rights to plaintiffs in each of the jurisdictions where the plaintiffs and class members reside.

45. Prior to plaintiffs' purchase of said minivans, defendants, individually and in concert with authorized dealerships and others, fraudulently represented to plaintiffs through advertisements, sales literature, false and misleading statements and material omissions that the airbags, related sensors and electronic components installed in its minivans were safe, and that its airbags would in all circumstances provide an extra measure of protection to front-seat occu-

pants irrespective of front-seat occupant height, weight, age, physical condition or proximity to the airbag.

46. By purchasing defendants' defective vehicles, plaintiffs have been harmed economically as they have not received the vehicles they contracted for and instead have been misled into purchasing vehicles with a diminished value. In essence, the defendants' vehicles with passenger airbags require plaintiffs and class members to risk serious injury and death of their front seat occupants and/or abandon using the front seats of their vehicles.

47. As a direct and proximate result of the defects and dangers inherent in the airbags, related sensors and electronic components installed in the minivans purchased by plaintiffs, and as a direct and proximate result of defendants' breaches of the duties set forth herein plaintiffs have suffered and will continue to suffer economic damages including:

a. The cost of retrofitting their minivans with airbags, related sensors and electronic components which will eliminate or significantly reduce the unnecessary dangers to front-seat occupants described hereinabove, yet continue to provide significant protection to front-seat occupants in high-speed frontal collisions;

b. Compensation for the diminution of the resale value of the minivans which they purchased;

c. Compensation for the diminution of their minivans' usefulness and/or convenience during the term of ownership resulting from the inadvisability of allowing children, adults of small stature, the elderly and the infirm to occupy either of the front seats;

d. Compensation corresponding to the difference between what plaintiffs actually paid to purchase their minivans, and what the reasonable consumer would have paid had they known of the defects and dangers described hereinabove;

e. Attorney's fees, cost, legal interest, and all general and equitable relief.

Count I: Breach of Express Warranty

48. The plaintiffs incorporate by reference the allegations in the foregoing paragraphs.

49. Plaintiffs and the class members are consumer purchasers or buyers of goods as that term is defined and interpreted by the Article 2 Uniform Commercial Code ("UCC") as adopted in several states, including Oklahoma and DaimlerChrysler's home state of Delaware.

50. Defendants falsely represented to plaintiffs and the class members that because their vehicles contained passenger airbags, these vehicles were safer than vehicles without the devices. Defendants expressly and falsely represented to plaintiffs and the class members in the marketing and sales of the vehicles that the airbags included made the vehicles safer without notifying plaintiffs and the class members of the known fact that the airbags in their vehicles, in certain types of crashes, pose a serious risk of injury and death from the deployment of the airbag. Defendants also falsely represented to plaintiffs and the class members that the front seats of the vehicles were suitable for human occupants despite their knowledge that the presence of the airbag made the vehicle unsafe for significant members of the population. Finally, defendants falsely represented that the vehicles were safe and in compliance with all relevant safety standards.

51. Under the terms of Section 2-313(1) of the UCC and common law, the affirmations of fact and the descriptions of the vehicles conveyed by defendants' marketing constitute express warranties.

52. In selling plaintiffs and the class members the vehicles with defective airbags, defendants have breached the express warranties noted above and caused damages to plaintiffs and the class members as set forth above.

Count II: Breach of Implied Warranty of Merchantability

53. Plaintiffs incorporate by reference the allegations in the foregoing paragraphs.

54. Plaintiffs and the class members are consumer purchasers or buyers of goods as that term is defined and interpreted by the UCC as adopted in several states, including Oklahoma and Michigan. Defendants are sellers as that term is defined and interpreted by Article 2 of the UCC.

55. Under the terms of Section 2-314 of the UCC and common law, the vehicles sold by the defendants were sold with an implied warranty of merchantability. To be merchantable, the vehicles should have been fit for the ordinary purpose of safe and normal operation, and free of dangerous operational and design defects.

56. In selling plaintiffs and the class members the defective passenger vehicles, defendants have breached their implied warranty of merchantability in that the vehicles are not fit for the ordinary purpose of safely transporting human passengers and contain a defective passenger airbag. This breach of warranty by the defendants has caused damage to plaintiffs and the class members.

Count III: Breach of Implied Warranty of Fitness

57. Plaintiffs incorporate by reference the allegations in the foregoing paragraphs.

58. Plaintiffs and the class members are consumer purchasers or buyers of goods as that term is defined and interpreted by the UCC as adopted in several states, including Oklahoma and Delaware. Defendants are sellers as that term is defined and interpreted by Article 2 of the UCC.

59. Under the terms of Section 2-315 of the UCC and common law, the vehicles sold by the defendants were sold with an implied warranty of fitness for the particular purpose of safely and normally operating the vehicles. Defendants knew or had reason to know that plaintiffs were purchasing

the vehicles for this purpose and that the plaintiffs were relying on defendants' skill and judgment as manufacturers to furnish vehicles to them that met this implied warranty.

60. In selling plaintiffs and the class members the defective vehicles, defendants have breached their implied warranty of fitness. This breach of warranty by the defendants has damaged the plaintiffs and the class members.

Count IV: Fraud and Deceit

61. Plaintiffs adopt by reference the allegations in the foregoing paragraphs.

62. Defendants made numerous representations to plaintiffs regarding the safety of its vehicles and the airbags contained therein. These representations, which are noted above, were false. Defendants made these false representations in their print and broadcast media advertising and in the sales pitches and sales literature distributed to the plaintiffs and class members before, at, or around the time of the sale, all as is more particularly contained and set forth in the information, documents and material in the possession and under the control of the Defendants and requested by the Plaintiffs in the discovery requests served with this Petition.

63. Defendants and their agents also fraudulently suppressed material facts from plaintiffs and the class members as set forth above regarding the fact that defendants' minivans equipped with passenger airbags are not fit for the particular purpose of safely transporting human passengers in all designated passenger positions in that they contain a defective passenger side airbag. Defendants committed these fraudulent omissions with full knowledge of the dangers of their passenger airbags.

64. The representations made by the defendants concerning the passenger airbags were false and made with either actual or constructive knowledge of their falsity.

65. The defendants' acts in knowingly making these false representations and/or suppressing material facts constitutes common law fraud and deceit.

66. The defendants' fraud and deceit has proximately caused the plaintiffs and the class members the damages set forth above.

CLASS ALLEGATIONS

67. The Class which plaintiffs seek to represent consists of all entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia, who purchased and who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one (1) model year; 1996-1997 "minivan" automobile marketed by defendant as Chrysler Town & Country or Chrysler Minivan or Plymouth Voyager or Plymouth Grand Voyager or Dodge Caravan, which was manufactured by defendant for sale in any of the fifty states of the United States of America or the District of Columbia, or which defendant marketed in any of the fifty states of the United States of America or the District of Columbia as a product of its own manufacture, which was configured at the time of original sale for occupancy by at least five (5) passengers, and which contains on the driver side and/or passenger side of the forward seating area a passive restraint system commonly known as an "airbag," which employs a fabric-covered envelope designed to expand rapidly with sodium azide or other gases and thus cushion a front-seat occupant when the system is activated by a sensor during a frontal collision.

68. Expressly excluded from the proposed Class are: (a) all persons or entities who have suffered personal injury or wrongful death as a result of the defective vehicles; (b) Defendants and their subsidiaries, affiliates, dealers, officers; directors, members of their affiliates, officers, dealers, and directors' immediate families, any entities in which Defendants have a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors and/or assigns of any of the aforementioned individuals or entities; (c) all currently serving justices, judges, and magistrate judges of the United States and the State of Oklahoma, their current

spouses, and all persons (and their current spouses) within the third degree of relationship to such justices, judges, magistrate judges, and spouses.

69. The persons comprising the proposed Class are so numerous as to make it impracticable for all of them to join or be joined as parties. For example, approximate United States sales volumes of model year 1996-1997 Chrysler Town & Country's, Chrysler Minivans, Dodge Caravans, Plymouth Grand Voyagers aid Plymouth Voyagers exceeds 1,000,000.

70. The character of the rights and remedies sought to be enforced on behalf of the named plaintiffs is common to all members of the proposed Class, and there are common questions of law and fact which predominate over any questions affecting only individual class members, to wit:

a. Whether the airbags installed in the minivans that the defendants sold to the named plaintiffs and other members of the proposed Class are defective and unreasonably dangerous for their normal intended use as set forth above.

b. Whether defendants adequately warned the named plaintiffs and other members of the proposed Class of the alleged defects and dangers inherent in their minivans' airbag- systems prior to sale,

c. Whether defendants, alone and in concert with their authorized dealers and others, deliberately misrepresented to the named plaintiffs and other members of the proposed Class, the safety characteristics of the airbag systems installed in their minivans.

71. The amount of compensation, if any, which the named plaintiffs and other members of the proposed Class are entitled to recover.

72. The claims of the named plaintiffs are typical of the claims of every member of the proposed Class, and the named plaintiffs, all of whom for the purpose of transporting young children, adults of small stature, the elderly and the

infirm purchased model year 1996-1997 minivans manufactured by defendant yet were never warned prior to sale that defendant's airbag systems presented risks of serious injury or death to front-seat occupants, will adequately and fairly protect the interests of every member of the Class proposed herein.

73. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the proposed Class which would establish incompatible standards of conduct for defendant.

74. It would be desirable and judicially economical to concentrate the litigation of these thousands of prospective claims in a single forum.

75. Undersigned counsel are experienced in complex litigation, class actions and automobile crashworthiness litigation, and will competently protect the interests of the named plaintiffs and every member of the Class.

PRAYER FOR RELIEF

WHEREFORE, the individual Plaintiffs, on behalf of themselves and all others similarly situated, pray for the judgment of the Court and the verdict of the jury for an Order in accordance with 12 O.S. § 2023 allowing this cause to be maintained as a Plaintiffs' class action, and compensatory damages in a reasonable amount to each of the named Plaintiffs and each member of the class, but not to exceed $75,000.00, exclusive of interest and costs.

Dated: August 7, 2000.

JURY DEMAND

Plaintiffs demand a jury trial in this matter.

SHERYL YSBRAND and MARY COONEY,
Plaintiffs

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By: /s/
HARRY SCOUFOS, O.B.A. # 8031

APPENDIX G

IN THE DISTRICT COURT IN AND FOR
SEQUOYAH COUNTY
STATE OF OKLAHOMA

SHERYL YSBRAND and MARY COONEY, Individually and on behalf of All others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. CJ-00-643
DAIMLERCHRYSLER CORPORATION, a Delaware Corporation, individually and as successor in interest to, Chrysler Corporation, and CHRYSLER CORPORATION, a Delaware Corporation, individually,	)	
Defendants.	)	

DEFENDANTS DAIMLERCHRYSLER CORPORATION AND CHRYSLER CORPORATION'S OPPOSITION TO CLASS CERTIFICATION

* * * *

[45]

1. Predominance

Plaintiffs summarily conclude that "common issues predominate in this case" because "the core liability issues in this case are based upon the same course of conduct directed toward each class member; the relief sought is the same for each class member; and the legal questions presented for liability and determination are the same for each class member" (Pltf. Mot. 25). Plaintiffs are wrong with respect to each assertion. Plaintiffs have clearly failed to meet their burden of proof on the critical predominance issue. And the direct, indisputable record facts clearly demonstrate: (1) every core issue underlying each of plaintiff's claims for breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness, and common law fraud requires an individual inquiry of each class member; (2) every cause of action presents significant individual questions; (3) the varying laws of 51 separate jurisdictions which must be applied to the claims of the putative class members raise unique issues; and (4) DaimlerChrysler's defenses to these claims will require individual inquiry.

* * * *

[55]

b. Variations in State Laws Preclude Certification.

Outcome determinative conflicts in the laws of the various states, standing alone, "preclude a finding of predominance as to questions of law," and make certification of plaintiffs' proposed nationwide class improper. *KMC Leasing*, 9 P.3d 683 at 690; *see also Conatzer*, 5 P.3d at 1257-58; *SIAS*, 8 P.3d at 187; *Bunch*, 898 P.2d at 172.

Indeed, Oklahoma courts are entirely consistent with the vast weight of authority from other jurisdictions holding that certification of nationwide classes is improper when varying laws apply to each class member's claims. *See, e.g., Spence v. Glock*, 227 F.3d 308, 312-16 (5th Cir. 2000)(rejecting at-

tempt to certify nationwide warranty class because plaintiffs failed to meet burden of showing common questions of law predominated); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996)(refusing to certify a nationwide class because "foremost among the difficulties" in such a case is the need to interpret and apply the laws of all fifty states); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)("in a multi-state class action, variations in state law may swamp any common issues and defeat predominance"). As one court noted, "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing the jury on the relevant law." *Am. Med. Sys.*, 75 F.3d at 1075. Here, this Court would fact such an impossible task. Plaintiffs' request that this Court certify a nationwide class implicates the laws of 51 varying jurisdictions, laws which require application of varying standards of conduct and varying burdens of proof.[13]

---

[13] A state may not apply its own law to claims in a nationwide class action unless the claims asserted by each class member had a "significant contact or significant aggregation of contacts" with the state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 302, 820-23 (1985). And under Oklahoma law, this Court is *required* to apply the law of the state with the "most significant relationship" with respect to both the tort claim and the contract claims under which Plaintiffs seek relief. *See, e.g., Brickner v. Gooden*, 1974 OK 91, 525 P.2d 632 (holding that the laws of the state with "the most significant relationship" to the occurrence govern); *Collins Radio Co. of Dallas v. Bell*, 1980 OK CIV APP 57, 623 P.2d 1039, 1046-47 ("most significant relationship" test applied to UCC Article 2 issues, including warranty issues). Under these choice of law principles, the law of Delaware—where Cooney resides and purchased her minivan—clearly applies to her claims. Ysbrand's claims are governed by Oklahoma law since she lives here and purchased and drives her vehicle here. Just as with named plaintiffs, this Court must apply the law of the state with "the most significant relationship" to each member of the putative class. Since plaintiffs seek to represent a putative class of individuals residing in, and who pur-

[Footnote continued on next page]

[56]

Plaintiffs make this request based on nothing more than a conclusory assertion that "common questions predominate." Plaintiffs have not met their burden of demonstrating how, in light of the discrepancies between the various state laws applicable, a finding of predominance could ever be made.[14]

The Oklahoma Supreme Court well expressed the fundamental problem with certifying a class like the one plaintiffs propose here:

> "The record establishes the trial court's efforts to analyze how this process would operate, and how it would invoke the substantive laws of numerous states. Appellants failed to present a detailed analysis of the process

---

[Footnote continued from previous page]

chased their vehicles in, 51 different jurisdictions, the laws of each of those jurisdictions are implicated.

[14] Plaintiffs indisputably bear the burden of proving that common issues of law predominate. *Conatzer*, 15 P.3d at 1257 (party who seeks certification has the burden of proving each of the requisite elements for a class action). This burden includes demonstrating the predominance of common questions, despite the court's need to apply the varying laws of multiple jurisdictions. *See KMC Leasing*, 9 P.3d at 690 ("during the hearing, appellants failed to present an in-depth analysis of choice of law and appellees effectively demonstrated the quagmire of legal issues in this area that are not common"); *SIAS*, 8 P.3d at 187 (plaintiff "who bears the burden of proof, has failed to offer any proof that other states' laws are in conformity with Oklahoma law"). As the California supreme court recently recognized, when (as here) a plaintiff seeks certification of a nationwide class, "a significant number of federal courts" require the plaintiff to "creditably demonstrate insuperable obstacles." *Washington Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1083 (Cal. 2001)(citations omitted). Plaintiffs here offer no analysis whatsoever.

> and instead argued the trial court should apply Oklahoma law to every facet of every transaction involved in the case at bar. Proof regarding liability and damages will require the trial court to analyze fraud issues under differing laws of numerous jurisdictions. Thus, individuality of issues will predominate not only as to proof but also as to the very elements necessary to establish fraud." *KMC Leasing*, 9 P.3d at 691.

[57]

Plaintiffs apparently rely on the supposed "uniform" nature of the Uniform Commercial Code in an attempt to meet this factor:

> "The proof necessary to establish plaintiffs claims for breach of implied and express warranties is exactly the same for each and every class member. The elements of these claims are set forth in the Uniform Commercial Code, and, thus, will not differ from state to state" (Pltf. Mot. 27).

Significantly, plaintiffs cite absolutely no authority for that proposition. They provide no analysis or survey of states' laws of warranty. Not one single case is cited in support of such a far-reaching statement, perhaps because courts repeatedly have found in the class action context that "the U.C.C. is far from uniform." *Christian*, 2001 WL 739147 at *2; *see also Fisher*, 181 F.R.D. at 369 n.3 (N.D. Ill. 1998) ("[T]he treatment of warranty claims from state to state is far from uniform"); *Walsh*, 807 F.2d at 1016 ("The Uniform Commercial Code is *not* uniform")(emphasis added)(quoting James J. White & Robert S. Summers, *Uniform Commercial Code* 7 (2d ed. 1980)); *Osborne*, 243 Cal. Rptr. at 820 ("[w]hile the nationwide adoption of the Uniform Commercial Code provides the [implied warranty] cause of action in virtually all states, it is not applied in the same fashion everywhere"). And a survey of the various states' differing laws shows plainly that plaintiffs are completely wrong—plaintiffs *never* could satisfy the predominance requisite in

light of the significant variations in the laws applicable to this case, only a few samples of which are set forth below.[15]

* * * *

[15] For a more extensive analysis of the conflicting laws applicable here, *see* DaimlerChrysler's "Variations in State Law" (Exhibit G).

APPENDIX H

IN THE DISTRICT COURT IN AND FOR
SEQUOYAH COUNTY
STATE OF OKLAHOMA

SHERYL YSBRAND and MARY COONEY, Individually and on behalf of All others similarly situated,	)	[Filed March 26, 2002]
Plaintiffs,	)	
v.	)	Case No. CJ-00-643
DAIMLERCHRYSLER CORPORATION, a Delaware Corporation, individually and as successor in interest to, CHRYSLER CORPORATION, a Delaware Corporation, individually,	)	
Defendants.	)	

DAIMLERCHRYSLER CORPORATION'S ANSWER TO PLAINTIFFS' PETITION

For its Answer, Additional and Affirmative Defenses to plaintiff's Petition, Defendant DaimlerChrylser Corporation (f/k/a Chrysler Corporation) ("DaimlerChrysler"), states and alleges as follows:

* * * *

[7]

ADDITIONAL DEFENSES

As and for its separate, distinct, and additional or affirmative defenses to plaintiffs' Petition, and to each cause of action thereof, DaimlerChrysler states as follows:

* * * *

[11]

THIRTY-FIRST ADDITIONAL DEFENSE

Plaintiffs' claims violate the constitutional rights of DaimlerChrysler and certain members of the putative class under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution by improperly applying Oklahoma or Michigan

[12]

law to claims stemming from purchases or leases that took place outside of Oklahoma or Michigan.

* * * *

WHEREFORE, Defendant DaimlerChrysler Corporation requests that this Court dismiss plaintiffs' Petition with prejudice, enter judgment in favor of DaimlerChrysler and

[13]

against plaintiffs, award DaimlerChrysler its reasonable attorneys' fees, costs, and expenses, and grant it all further legal and equitable relief as this Court finds to be just and proper.

PHILLIPS McFALL McCAFFERY
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Attorneys for DaimlerChrysler Corporation and Chrysler Corporation

APPENDIX I

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

SHERYL YSBRAND and MARY COONEY, Individually and on behalf of all others similarly situated,	)	[Filed March 15, 2002]
Plaintiffs/Appellees,	)	
vs.	)	No. 97469
DAIMLERCHRYSLER CORPORATION, a Delaware corporation, individually and as Successor in Interest to Chrysler Corporation and and CHRYSLER CORPORATION, a Delaware corporation, individually,	)	District Court No. CJ-2000-643
Defendants/Appellants.	)	

PETITION IN ERROR

_X_ PETITION IN ERROR
_____ AMENDED OR SUPPLEMENTAL PETITION
_____ CROSS PETITION
_____ COUNTER-PETITION
_____ DATE FIRST PETITION IN ERROR FILED:

I. TRIAL COURT HISTORY

COURT/TRIBUNAL: District Court
COUNTY: Sequoyah County
CASE NO.: CJ-2000-643
JUDGE: John C. Garrett
NATURE OF CASE: Class Action

NAME OF PARTY OR PARTIES FILING THIS PETITION IN ERROR: DaimlerChrysler Corporation and Chrysler Corporation

THE APPEAL IS BROUGHT FROM: (Check one)

_____ Judgment, Decree or Final order of District Court.
_____ Appeal from order granting summary judgment or motion to dismiss where motion filed after October 1, 1993 (Accelerated procedure under Rule 1.36).
Appeal from Revocation of Driver's License (Rule 1.21(b)).
_____ Final Order of Other Tribunal.
(Specify Corporation Commission, Insurance Department, Tax Commission, Court of Tax Review, Banking Board or Banking Commissioner, etc. _____)
_X_ Interlocutory Order Appealable by Right
_____ Other _____

II. TIMELINESS OF APPEAL

1. Date judgment, decree or order appealed was filed: February 14, 2002

2. *If decision was taken under advisement*, date judgment, decree or order was mailed to parties: N/A

3. Does the judgment or order on appeal dispose of *all* claims by and against all parties?
_____ Yes _X_ No.
If not, did district court direct entry of judgment in accordance with 12 O.S. Supp.1995 §994?

_____ Yes _X_ No.
When was this done?

4. If the judgment or order is not a final disposition, is it appealable because it is an Interlocutory Order Appealable by Right? _X_ Yes ____ No.

5. If none of the above applies, what is the *specific* statutory basis for determining the judgment or order is appealable?

6. Were any post-trial motions filed?

Type	Date Filed	Date Disposed
N/A		

7. This Petition is filed by: _X_ Delivery to Clerk, or

_____ Mailing to Clerk by U.S. Certified Mail, Return Receipt Requested.

III. RELATED OR PRIOR APPEALS

List all prior appeals involving same parties or same trial court proceeding: None
List all related appeals involving same issues: None

IV. SETTLEMENT CONFERENCE

Is appellant willing to participate in an attempted settlement of the appeal by predecisional conference under Rule 1.250? _____ Yes _X_ No.

V. RECORD ON APPEAL

_X_ A Transcript will be ordered.

_____ No Transcript will be ordered because no record was made and/or no transcript will be necessary for this appeal.

_____ A Narrative Statement will be filed

_____ Record is concurrently filed as required by Rule 1.34 (Driver's License Appeals, etc.) or Rule 1.36 (Summary judgments and motions to dismiss granted).

VI. JUDGMENT, DECREE OR ORDER APPEALED-EXHIBIT "A"

(A certified copy of the February 14, 2002 Memorandum Opinion is attached as Exhibit "A")

VII. SUMMARY OF CASE—EXHIBIT "B"

VIII. ISSUES TO BE RAISED ON APPEAL—EXHIBIT "C"

IX. NAME OF COUNSEL OR PARTY, IF PRO SE

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DATE: March 15, 2002

Verified by: /s/
(Signature of Attorney or Pro Se Party)

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X. CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the Petition in Error was mailed this 15th day of March, 2002, by depositing it in the U.S. Mails, postage prepaid to the following:

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/s/

I further certify that a copy of the Petition in Error was mailed to, or filed in, the Office Sequoyah County Court Clerk, 120 E. Chickasaw Street, Sallisaw, Oklahoma 74955, on the 15th day of March, 2002.

/s/

[Exhibit A Reproduced *Supra* at pp. 21a-42a]

[Exhibit B Omitted]

Exhibit "C": Issues on Appeal

1. Whether the named plaintiffs are adequate class representatives notwithstanding that they were solicited to bring this action, had no knowledge or complaint about their minivan airbags until being solicited, and were not informed by their counsel of their potential liability for attorney's fees and costs on their warranty claims?

2. Whether the two plaintiffs and their counsel can adequately represent more than 1,000,000 class members throughout the country, and whether a Sequoyah County District Court class action is a superior method for the fair and efficient adjudication of this controversy, notwithstanding that no minivan involved in the class definition was purchased in that county, the same claims were unsuccessfully asserted before the National Highway Traffic Safety Administration ("NHTSA") and by most of Plaintiffs' counsel in a federal district court action in Louisiana, and the only connection between the controversy and Sequoyah County appears to be previous class certifications achieved by Oklahoma counsel in Sequoyah County?

3. Whether Sequoyah County District Court, serving sparsely populated communities, and served by a single associate district judge, is a superior forum for the fair and efficient adjudication of massive national class action litigation to adjudicate rights of more than 1,000,000 class members?

4. Whether the trial court abused its discretion by certifying a class action implicating state contract and tort laws of all 50 states and the District of Columbia without citing, analyzing or heeding the choice of law considerations required by *KMC Leasing, Inc. v. Rockwell Standard Corp.*, 2000 OK 51, 9 P.3d 683 and other authorities (which were repeatedly cited to the court and discussed in briefing)?

5. Whether the trial court's certification order must be reversed because the named class representatives, as well as the class members they propose to represent, have suffered no injury—*i.e.*, whether Oklahoma should join the vast majority of jurisdictions which reject claims based on an alleged defect

which is unmanifest? *E.g.*, *Briehl v. General Motors Corp.*, 172 F.3d 623, 627-29 (8th Cir. 1999); *cf.*, *Scoufos IV v. State Farm Fire and Casualty Co.*, 2001 OK 113, ¶11, ___ P.3d ___ (reversing class certification order where there was no allegation that class representative had suffered any injury, finding that his claims would therefore not be typical of claims asserted by the only potential class members).

6. Whether class certification is a proper and efficient means of adjudicating the claims asserted under the circumstances of this case where an inspection of more than 1,000,000 vehicles would be required just to determine the identity of the members of the class?

7. Whether the trial court's certification order for class claims seeking to retrofit airbags on more than 1,000,000 vehicles constitutes an abuse of discretion where federal law explicitly governs the configuration of such airbag devices and prescribes procedures for deactivating airbags under limited and specifically delineated circumstances?

8. Whether differences in the airbags, the warnings and labels accompanying such airbags, and the automobiles in which the airbags are contained preclude the trial court's findings of commonality, typicality, and predominance of common issues of law or fact?

9. Whether this Court should adopt the view of those jurisdictions which have held that the superior resources and expertise of the NHTSA in addressing important vehicle safety issues affecting potentially millions of United States citizens may render a class action an undesirable method of adjudicating such controversies?

10. Whether the selection of relief which appears to be preempted by federal law further indicates the inadequacy of representation of the class members in this case?

11. Whether the trial court adopted an impermissibly vague and overbroad class definition which, among other facial deficiencies, fails to identify class members by reference to objective criteria, which would require a vehicle-by-vehicle in-

spection of more than 1,000,000 vehicles to determine class membership, which includes "current" owners of vehicles without reference to any point in time, and which fails to distinguish between owned and leased vehicles, or between vehicles carrying passengers and those which do not?

12. Whether the class definition improperly includes the same litigants in a former putative class action brought by many of the class action counsel in this case against whom judgment on the merits was rendered in *In re: Air Bag Products Liability Litigation,* 7 F.Supp. 2d 792 (E.D. La. 1998), and whose claims would be barred by *res judicata* and collateral estoppel?

13. Whether the trial court abused its discretion and legally erred by deferring the identification of class members until after trial, in view of the consequent inability to ascertain the number of class members for purposes of determining numerosity under 12 O.S. 1991, §2023(A)?

14. Whether the variety of types of injuries which would be suffered by putative class members, depending on the particular warnings, airbags, automobile configuration, and kinds of individuals riding in the passenger seat and the differing defenses that would apply to such claims render erroneous the trial court's findings of typicality and commonality in this case?

15. Whether the fact that plaintiffs claim damage for class members in the range of $75,000 each demonstrates that class members have sufficient interest in prosecuting their claims individually, contrary to the district court's finding that a Sequoyah County District Court class action is a superior method of adjudicating their claims?

16. Whether the trial court's certification of a class action involving residents of all 50 states and the District of Columbia without conducting any choice of law analysis, much less determining which law applies to the claims alleged, violates the Commerce Clause and Privileges and Immunities Clause of the United States Constitution, the Due Process Clause of the Fourteenth Amendment to the United

States Constitution, and due process requirements imposed by the Constitutions of the States within the class certified, because that ruling, among other things, directly regulates and burdens interstate commerce, offends the sovereignty of other states, is arbitrary, irrational and fundamentally unfair, and potentially projects Oklahoma's laws beyond state borders?

APPENDIX J

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

SHERYL YSBRAND and MARY COONEY, Individually and on behalf of All others similarly situated,	)	[Filed May 13, 2002]
Plaintiffs/Appellees,	)	
vs.	)	No. 97469
DAIMLERCHRYSLER CORPORATION, a Delaware Corporation, individually and as successor in interest to, Chrysler Corporation and CHRYSLER CORPORATION, a Delaware Corporation, individually,	)	District Court No. CJ-2000-643
Defendants/Appellants.	)	

APPELLANTS' BRIEF IN CHIEF

* * * *

[12]

ARGUMENT AND AUTHORITIES

* * * *

II. THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S FINDING THAT COMMON QUESTIONS OF LAW OR FACT PREDOMINATE.

While Plaintiffs failed to satisfy many of the standards under 12 O.S. 2001, §2023, space permits discussion of only the plainest deficiencies. A principal one is Plaintiffs' failure to establish the predominance of common questions as required by § 2023(B)(3). Defendants begin with the crucial problem—virtually ignored by Plaintiffs and the lower court—of determining and applying the various laws of all 50 states and the District of

[13]

Columbia.

A. Applying Laws of 50 States and the District of Columbia to 1,000,000 Class Members' Express and Implied Warranty and Tort Claims

Defendants spent more than half of their briefing in the trial court addressing the daunting problem of ascertaining and applying the varying laws of all 50 states and the District of Columbia to each of the four theories of recovery, including all their elements and defenses. Defendants demonstrated the significant differences in applicable laws on a multitude of issues which would have to be determined on Plaintiffs' implied and express warranty and tort claims.[12]

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[12] These issues include, for example, the consequences of differences in treatment for: lack of manifest injury, vertical privity, new and used vehicle purchasers, standards of merchantability,

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Defendants furnished the trial court with a separate 55-page brief extensively cataloguing and discussing the state law differences in detail. Def. Ex. G.

Plaintiffs did not deny these substantial variances in applicable state laws as to each of their theories of recovery and Defendants' defenses—nor did the trial court hold that the variances did not exist. Rather, Plaintiffs and the trial court all but ignored the problem. This Court will not find in the trial court's one-paragraph decision (R. 1557) a citation to any Oklahoma decision on the topic—including this Court's most recent one, *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, 9 P.3d 683, 690. In *KMC Leasing*, this Court found that common questions did not predominate as to a proposed, small nationwide class of private aircraft owners, and observed that among other things the "choice of law" issue alone contained:

> . . . a plethora of additional subissues including applicable statutes of limitations and the tolling provisions of each applicable states' breach of implied warranty provisions and statute of limitations sections of the non-uniform Uniform Commercial Code, applicable choice of law statutes and applicable statutes concerning fraud and deceit. . . . Although the

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duration of implied warranties, measures of damages, standards for determining express warranties, standards for establishing reliance, notice requirements, affirmative defenses, burden of proof requirements on fraud claims, allowance of economic damages on fraud claims, elements of fraud, necessity of establishing scienter, standards on reliance, statutes of limitation, and proof requirements for defective design and inadequate warnings. R. 418-432.

> determination of these issues goes to the merits of the instant case, their very existence precludes a finding of predominance as to common questions of law, if any.

Id., ¶20. *See also Sias v. Edge Communications, Inc.*, 2000 OK CIV APP 72, ¶¶16-18, 8 P.3d 182; *Bunch v. KMart Corp.*, 1995 OK CIV APP 41, 898 P.2d 170, 172; *Conatzer v. American Mercury Ins. Co.*, 2000 OK CIV APP 141, ¶25, 15 P.3d 1252. It was Plaintiffs' burden to analyze the potential law variations and choice of law difficulties affecting class certification here to establish that certification was appropriate, and to specifically address the numerous potentially divergent state law issues subsumed in the elements of and potential defenses to their claims.[13]

Like this Court, the vast weight of authority from other jurisdictions holds that certification of nationwide classes is improper when varying laws apply to each class member's claims.[14] Unique questions of law and fact will arise from

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[13] *KMC Leasing*, 9 P.3d at 690 (plaintiffs "failed to present an in-depth analysis of choice of law"); *Sias*, 8 P.3d at 187 (plaintiff "who bears the burden of proof, has failed to offer any proof that other states' laws are in conformity with Oklahoma law"); *Adams v. Kansas City Life Ins. Co.*, 192 F.R.D. 274, 278 (W.D. Mo. 2000) (plaintiff does not satisfy burden by submitting a series of tables showing similarities in state laws, without analyzing "numerous potentially divergent state law issues subsumed" in the elements of plaintiff's claims and whether defendant can assert certain defenses); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) ("[N]ationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'").

[14] *E.g.*, *Spence v. Glock*, 227 F.3d 308, 312-16 (5th Cir. 2000) (rejecting attempt to certify nationwide warranty class because plaintiffs failed to meet burden of showing common questions of law predominated); *American Medical Systems, Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the fifty states differ, the district judge would face an impossible task of instruct-

[Footnote continued on next page]

the breach of warranty and fraud claims asserted by Plaintiffs in this nationwide class action, as they did in *In re Bridgestone/Firestone, Inc.*, 2002 WL 831990 (7th Cir. 2002) (Appendix H hereto) (alleged defective auto tires); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 453-62 (D.N.J. 1998) (alleged

[15]

defective vehicular ABS system); *In re Ford Motor Co. Vehicle Paint Litigation*, 182 F.R.D. 214, 220 (E.D. La. 1998) (alleged defective automobile paint).

The problem of determining and applying varying state laws is well illustrated by Plaintiffs' reliance on the novel theory that vehicle owners nationwide with airbags which have never malfunctioned can recover for breach of warranty and fraud. Their specific assertion that they can recover for alleged airbag defects without a "manifest injury" has already been rejected under Texas law as to the same claims asserted here. *In re Airbag Products Liability Litigation*, 7 F. Supp.2d at 803-804 (*Marble* case—concluding that "the absence of manifest injury is so fundamental a deficiency in tort or implied warranty claims that such claims are more appropriately dismissed than preserved"); *Id.* at 805-806 (*Rodri-*

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ing the jury on the relevant law, yet another reason why class certification would not be the appropriate course of action."); *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (class certification inappropriate where laws of 48 states potentially applied, citing authorities); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (refusing to certify a nationwide class because "foremost among the difficulties" in such a case is the need to interpret and apply the laws of all fifty states).

guez case—similar).[15] Many jurisdictions have ruled likewise.

Plaintiffs relied upon the now-reversed decision in *Bridgestone/Firestone, Inc., supra*, as contrary authority. In reversing that decision, the Seventh Circuit observed that "[no] injury, no tort, is an ingredient of every state's law," *Bridgestone/Firestone, Inc., supra*, 2002 WL 831990 (Appendix H hereto) at *3, and cited numerous authorities for its conclusion that "most states would not entertain the sort of theory that plaintiffs press." Like Oklahoma, however, many jurisdictions have not yet addressed the question. Sequoyah County District Court would need to review the relevant jurisprudence of each such state in order to *predict* whether that state will, when ultimately presented with the question, allow recovery in warranty and tort notwithstanding the lack of a manifest injury.[16] To the

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extent that Plaintiffs do have any viable claim under any state's law without a manifest injury, a clear conflict with the law of many other states exists.

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[15] *E.g., Briehl v. General Motors Corp.*, 172 F.3d 623, 625 n.4, 627-29 (8th Cir. 1999) (no claims for unmanifest defect in consolidated class actions commenced in Florida, Mississippi, Missouri, New York, and Texas); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629-30 (Ala. 1998) (same under Alabama law); *American Suzuki Motor Corp. v. Superior Court*, 37 Cal.App.4th 1291, 1299-1300 (Ct. App. 2d Dist. 1995) (same under California law).

[16] *See Rudd Constr. Equip. Co. v. Clark Equip. Co.*, 735 F.2d 974, 978 (6th Cir. 1984) (discussing problems with predicting other states' law with no state appellate review, particularly where there is a "dearth of direct authority" and there is "considerable variation in the treatment of like issues by the courts of different states").

Plaintiffs and the trial court ignored this analysis entirely with respect to the fraud claims. And as to the warranty claims, Plaintiffs discounted the problem by concluding that state laws would not differ from state to state since the U.C.C. was involved. R. 284, Pltf. Mot. p. 27. As this Court recognized in *KMC Leasing*, and Defendants otherwise demonstrated in their detailed survey of each jurisdiction's law, variances abound in the "non-uniform Uniform Commercial Code . . . ." *Id.*, 2000 OK 51, ¶20, 9 P.3d 683, 690.[17]

Neither the Plaintiffs nor the trial court suggested that the court could apply *Oklahoma* law to each of the warranty and tort claims asserted on behalf of all million-plus class members residing throughout every state. Due process requires that the claims asserted against Defendants will be governed by the applicable state law, determined by the contacts between the state and any given class member. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 820-23 (1985); *Bridgestone/Firestone, supra*, 202 WL 831990 at *3 (Appendix H) (courts must respect differences in state laws rather than apply one state's law to sales in other states with different rules); *In re School Asbestos Litigation*, 789 F.2d 996, 1007 (3d Cir. 1986) ("The parties' rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used.').

In spite of its complexity, the trial court disposed of the entire choice-of-law issue in one paragraph (R. 1557), citing only a November 28, 2001 lower court order in *Bridge-*

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[17] Courts repeatedly have found in the class action context that "the U.C.C. is far from uniform." *Christian v. Sony Corp. of Am.*, 2001 WL 739147, *2 (D. Minn. 2001) (Appendix D); *Walsh*, 807 F.2d at 1016 ("The Uniform Commercial Code is not uniform") (quoting James J. White & Robert S. Summers, *Uniform Commercial Code 7* (2d ed. 1980)); *Fisher v. Bristol-Meyers Squibb Co.*, 181 F.R.D. 365, 369 n.3 (N.D. Ill. 1998) (similar).

stone/Firestone, Inc., supra. That court's holding—that it could apply the law of the

[17]

defendants' headquarters, based on special Indiana choice-of-law rules[18] —was emphatically rejected on appeal, in a thorough analysis of the choice of law issue. *Bridgestone/Firestone, supra*, 2002 WL 831990 at *3-4 (Appendix H). The Seventh Circuit observed:

> [S]tate laws about theories such as those presented by our plaintiffs differ, and such differences have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes. [Citations omitted.] The district judge, well aware of this principle, recognized that uniform law would be essential to class certification.

Id. at *1. The appellate court characterized the district court's proposed solution to apply the law of defendants' headquarters as "a novelty" which had not been adopted by Indiana or any other jurisdiction, and held that choice of law principles would require application of the law of all the jurisdictions where plaintiffs purchased their vehicles and tires, rendering class certification improper. *Id.* at *2-3. Oklahoma law leads to the same result, both as to Plaintiffs' fraud claims and warranty claims.[19] In this nationwide class action

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[18] The trial court's opinion here is devoid of any such choice of law analysis as to the claims asserted by Plaintiffs. R. 1557. In fact, the trial court's order does not even indicate which or how many states' laws are to be applied.

[19] Oklahoma law requires application of the law of the state with the "most significant relationship" with respect to tort claims. *Brickner v. Gooden*, 1974 OK 91, 525 P.2d 632. *See KMC Leasing, Inc., supra*, 2000 OK 51, ¶26, 9 P.3d at 691 ("Proof regarding liability and damages will require the trial court to analyze fraud issues under differing laws of numerous jurisdictions. Thus, indi-

[Footnote continued on next page]

these principles are likely to lead to the application of all the states' laws. *KMC Leasing*, 2000 OK 51, ¶20, 9 P.3d at 689.

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III. A CLASS ACTION IN SEQUOYAH COUNTY IS NOT A SUPERIOR METHOD OF ADJUDICATING PLAINTIFFS' CLAIMS.

The focus of the superiority requirement "is upon the benefits which the class action

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procedure has over the other alternative methods of adjudicating the dispute, balanced against the management problems which may arise from class treatment." *Shores*, 689 P.2d at 305. Plaintiffs did not address, in their discussion of "superiority" or otherwise, the federal regulatory scheme governing airbag configuration and warnings, federal preemption, primary jurisdiction, or logistical problems involved in having a state court attempt to define automotive safety standards for the entire nation.

[Footnote continued from previous page]

viduality of issues will predominate not only as to proof but also as to the very elements necessary to establish fraud."). *Collins Radio Co. v. Bell*, 1980 OK CIV APP 57, 623 P.2d 1039, 1045-48 (under U.C.C. place of delivery of goods usually applies, and sometimes place where relationship is centered applies). The choice of law analysis under U.C.C. §1-105, applicable here, has led other courts to deny class certification on warranty claims. *E.g.*, *Christrian*, *supra*, 2001 WL 739147, *2-3 (Appendix D); *In re: Masonite Corp. Hardboard Siding Products Liability Litigation*, 170 F.R.D. 417, 423-24 (E.D. La. 1997); *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*, 1992 WL 193661 at *6-7 (D. Kan. 1992) (Appendix E).

A. The Superiority of the Federal Administrative Remedial Scheme

The federal regulatory scheme governing airbags promotes national, uniform safety standards based upon findings of an agency with the expertise and resources to determine such issues and the objective of best protecting all U.S. citizens. *See Far East Conference v. U.S.*, 342 U.S. 570, 574-75 (1952) (discussing the public policy reasons why administrative agencies should be the first to determine such issues, even when the facts appraised through their "specialized competence serve as a premise for legal consequences to be judicially defined."). A private class action (even one not instigated by lawyers through forum shopping and solicitation of class representatives) is instead calculated toward advancing private economic interests.

Here, airbags are approved by NHTSA in view of the specific configuration of the automobile in which they are placed, and any modification to the airbag is a matter of grave concern, since it can increase and exacerbate injuries and deaths. Def. Ex. C, Nusholtz Affid., ¶¶4-5, 8. The risks of increased injury would be particularly acute, for example, to the members of the Ysbrand family, who are all more than 230 pounds and over 6 feet tall. *Id.*, ¶8; Def. Ex. B, Ysbrand Dep. at 7-8, 27. To allow private actions in any or each available jurisdiction in the nation to influence the formulation of such crucial national safety standards, affecting a broad spectrum of U.S. citizens, would lead to often-incompatible and competing claims—and jury-imposed standards—as to how consumers

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will be protected. Moreover, allowing one state to apply its laws in a manner which regulates automotive safety policy within the purview of NHTSA threatens basic principles of federalism—recognized in *Healy v. The Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996)—which prevent one state from applying remedies which regulate conduct occurring in

other states and which interfere with such states' own policy choices on the matter.

* * * *

APPENDIX K

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

SHERYL YSBRAND and MARY COONEY, Individually and on behalf of All others similarly situated,	)	
Plaintiffs/Appellees,	)	
vs.	)	No. 97469
DAIMLERCHRYSLER CORPORATION, a Delaware Corporation, individually and as successor in interest to, CHRYSLER CORPORATION, a Delaware Corporation, individually,	)	District Court No. CJ-2000-643
Defendants/Appellants.	)	

APPELLANTS' REPLY BRIEF

* * * *

[1]

APPELLANT'S REPLY BRIEF

INTRODUCTION

Defendants' Brief in Chief showed that variations in the law applicable to the claims of more than 1,000,000 minivan owners would overwhelm any court and render a class action totally unmanageable. State as well as federal judges throughout the country have recognized this fact and uniformly refuse to certify nationwide classes because of variations in state law. In response, Plaintiffs argue that the district court made a reasoned decision to apply Michigan law to the claims of every class member everywhere, even though that decision is not found anywhere in the class certification order Plaintiffs drafted for the Court's signature, and even though such a ruling (had it in fact been made) would violate choice of law rules followed in Oklahoma and almost every other state. To support the decision that the trial court never made, Plaintiffs rely on a federal district court's opinion which was not only reversed but harshly criticized by the Seventh Circuit Court of Appeals on the very point for which Plaintiffs offer it here. Without support in the record or in the case law for the application of Michigan law to the claims of class members nationwide, Plaintiffs now judicially admit the factual basis for Defendants' *forum non conveniens* motion, permitting them to argue in this Court that an Oklahoma court should interpret and apply Michigan law, even though they successfully opposed below a *forum non conveniens* dismissal which would have allowed a Michigan court to apply Michigan law.

As is shown below, Plaintiffs' newly-minted arguments do not address the choice of law problems that require that the district court's certification order be reversed. Nor could the application of Michigan law eliminate the factual variations that preclude certification of any class in this case. Plaintiffs have otherwise sought to avoid direct analysis of the predominance obstacles to class certification. Thus, while Defendants urged that numerous individual factual

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issues would inextricably be a part of the necessary adjudication of Plaintiffs' warranty and fraud claims, Plaintiffs' principal response has been to rely on an inapplicable settlement class action case where no merits issues were to be tried; to assert that Defendants are raising different issues than those discussed in Defendants' Proposition II(B), pp. 18 *et seq.*; and/or to argue that any such predominance problem should be deferred.

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[5]

ARGUMENT AND AUTHORITIES

I. COMMON QUESTIONS OF LAW DO NOT PREDOMINATE

Plaintiffs deny that the fraud and warranty claims they assert for a nationwide class of automobile purchasers would engage the substantive laws of numerous jurisdictions throughout the country notwithstanding that the class members reside in all 50 states and the District of Columbia Plaintiffs do *not* deny that *if* the law of multiple jurisdictions applies, common questions will not predominate and manageability problems will prevent certification. Instead, Plaintiffs advance two contradictory assertions: (1) the trial court should not be required to confront the demonstrated choice of law problem, since that court can always decertify a class later; and (2) although the trial court did not say so in any part of the 21-page decision Plaintiffs drafted for its signature, it "intended" to hold that Michigan law applied to every claim of more than 1,000,000 class members residing in every state.

Defendants address these assertions in turn. Because Plaintiffs bear the burden of proving that common issues of law predominate, it was their burden to show that the application of other states' laws would not render the case unmanageable. *Sias v. Edge Communications, Inc.*, 2000 OK CIV APP 72, ¶16, 8 P.3d 182, 187 ("Sias, who bears the burden of proof, has

failed to offer any proof that other states' laws are in conformity with Oklahoma law on the elements of fraud."). Applying the federal counterpart from which Oklahoma's class action

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statute was borrowed, the federal courts agree:

> The burden of proof lies with the plaintiffs; in not presenting a sufficient choice of law analysis they have failed to meet their burden of showing that common questions of law predominate. [Citation omitted.] The district court is required to know which law will apply before it makes its predominance determination.

Spence v. Glock, 227 F.3d 308, 313 (5th Cir. 2000). *See also* the numerous authorities cited in Defendants' Brief in Chief at 14 and n.13. By urging either a deferral of the issue or the application of Michigan law to the claims of all class members (both offered for the first time on appeal), Plaintiffs effectively concede that a class should not have been certified if varying laws apply to each class member's claims.

Plaintiffs mistakenly suggest that *Lobo v. Amoco Production Co.*, 1999 OK CIV APP 112, ¶6, 991 P.2d 1048, 1051 authorizes a trial court to certify a class while deferring its consideration of an apparent choice of law problem. In *Lobo* the court relied upon the trial court's finding that the defendant had "'failed to show an actual conflict of law that has a material effect on this action.'" *Id.*, ¶6.[7] Aside from the fact that Defendants here did make such a showing, the Court of Appeals' non-precedential decision in *Lobo* appears

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[7] Although the Court of Appeals quoted the trial court's statement that it was defendant's burden to make such a showing, *id* at 1051, this is mistaken. *See* authorities discussed above and in Defendants' Brief in Chief at 14 and n.13, showing that it is plaintiffs' burden to address and show that choice of law problems will not prevent common issues of law from predominating.

to be inconsistent with later decisions on this point. *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶20, 9 P.3d 683, 690 (holding in national class action that the "very existence" of issues concerning the states' applicable statute of limitations, tolling provisions, breach of implied warranty provisions, choice of law statutes, and statutes concerning fraud and deceit "precludes a finding of predominance as to common questions of law, if any."); *id.* at ¶ 26, 9

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P.3d at 691 (holding that trial court would be required to "analyze fraud issues under differing laws of numerous jurisdictions" and thus "individuality of issues will predominate not only as to proof but also as to the very elements necessary to establish fraud."); *Sias v. Edge Communications, supra*, 2000 OK CIV APP 72, ¶16, 8 P.3d at 187 ("However, with respect to those non-residents who did not opt out, the trial court would be faced with determining and applying the fraud laws of all 50 states.").[8] It is also inconsistent with the general rule from which these holdings derive, namely: "The party who seeks certification has the burden of proving each of the requisite elements for a class action." *Conatzer v. American Mercury Ins. Co., Inc.*, 2000 OK CIV APP 141, ¶22, 15 P.3d 1252, 1257. Moreover, if a district court could defer consideration of inevitable choice of law issues in a national class action and thus relieve plaintiff of the burden of proving that common issues of law will predominate under §2023(B)(3), the court could with equal logic defer consideration of any of the standards for class certification, *e.g.*, superiority of a class action under §2023(B)(3), or adequacy of representation under §2023(A)(4).

While Plaintiffs' suggestion that such considerations may be deferred is irrelevant here (since as discussed below the is-

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[8] These are holdings on questions of law, so that it is immaterial that the Court was affirming rather than reversing the district court.

sue was *not* deferred), it is also a distortion of the purpose of the trial court's power of decertification. Once a class is certified, class members must be given notice, due process rights are engaged, and there can be implications to statutes of limitations.[9] Moreover, the *burden* on the issue of decertification is placed on the *opponent* of certification,

[8]

rather than the *proponent* who bears that burden on initial certification proceedings.[10] Plaintiffs' argument would thus shift to the opponent the burden of proving that common issues of law do *not* predominate, contrary to the precedents of this Court and every other jurisdiction that the plaintiff bears the burden of proving that all statutory requirements for class certification are met (discussed *supra*). The courts do not tolerate this approach to class certification, particularly in a national class action, even when the trial court certifies a "conditional" class (and the trial court here did no such thing). *See Castano v. American Tobacco Co.*, 84 F.3d 734, 741-44 (5th Cir. 1996), discussing additional authorities, holding district court must conduct predominance and superiority inquiries which include consideration of variations in state law, and that this inquiry is "especially important" when it is apparent that

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[9] As to limitations issues, *see Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000); as to implication of due process rights, *see generally* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 1785 at p.137 ("The court should exercise its power to alter or amend its class action determination with great care for the due process rights of the absent class members.").

[10] *Slaven v. BP America, Inc.*, 190 F.R.D. 649, 651 (C.D. Cal. 2000) ("A party seeking class certification bears the burden of demonstrating that the proposed class satisfies the four elements of Rule 23(a), as well as the elements of at least one provision of Rule 23(b). [Citations omitted.] It follows, therefore, that *a* party seeking decertification of a class should bear the burden of demonstrating that the elements of Rule 23 have not been established.").

there may be differences instate law. As another court recently held with respect to the theories of recovery relied upon by Plaintiffs here: "A nationwide class in what is fundamentally a breach-of-warranty action, coupled with a claim of fraud, poses serious problems about choice of law, the manageability of the unit, and thus the propriety of class certification." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672,674 (7th Cir. 2001). The trial court may not certify such a class "without resolving factual and legal disputes that strongly influence the wisdom of class treatment." *Id.* at 675.[11] Even where courts decide class certification motions without undertaking a *comprehensive* analysis of the choice of law issue, they do not wholly abdicate the duty to preliminarily confront the problem,

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particularly in the context of a national class action.[12]

Regardless of whether the required choice of law analysis is preliminary or comprehensive, Plaintiffs are mistaken in suggesting that the choice of law problem could simply be ignored, somehow immunizing the trial court—which incidentally did *not* ignore it—from appellate review on the subject. The trial court was not faced with a limited class involving one or two choice of law issues, but with a nation-

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[11] *See also In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 225 (E.D. La. 1998) (holding that plaintiffs had burden of establishing that variations in laws of 50 jurisdictions did not *defeat* predominance, citing *Castano, supra.*).

[12] *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 497-98 (S.D. Ill. 1999) (denying class certification in product liability national class action, holding that it was unnecessary to finally determine choice of law at the class certification stage but finding, based on its *preliminary* analysis, that the court would likely have to apply the law of all 47 states involved, and concluding: "The choice of law question creates an insurmountable obstacle for the plaintiffs to overcome.").

wide class of more than 1,000,000 minivan owners in every state and the District of Columbia. Unlike *Lobo*, Defendants raised from the outset the outcome-determinative choice of law issues which rendered (and still render)' class certification improper. Defendants here exhaustively reviewed the various laws which would have to be applied to Plaintiffs' fraud and warranty claims, and to Defendants' defenses to those claims (R. 416-432 and Def. Ex. G, a 55-page, thorough analysis). That review demonstrated that (1) even undertaking the necessary choice of law analysis for all 50 states and the District of Columbia would present intractable management problems, and (2) such an analysis would lead to application of numerous states' laws, so that common questions would never predominate. No authority, including *Lobo*, indicates that the trial court may certify a class in the face of demonstrable problems arising from choice of law and the applicability of various states' laws which prevent common issues from predominating.[13]

[10]

More fundamentally, Plaintiffs' suggestion that the court could have ignored the choice of law problem is irrelevant here, since the district court did *not* ignore it. The court reached the issue in the last paragraph at R. 1557, where it concluded that "the alleged choice of law problems identified by the defendants does [sic] not bar certification," based upon its review of Plaintiffs' authorities, citing without analysis the now-reversed decision in "*Bridgestone/Firestone, Inc. Tires Product Liability Litig.*, ___

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[13] *See Bunch v. KMart Corp.*, 1995 OK CIV APP 41, 898 P.2d 170, 172, where the court reversed certification of a nationwide class based on its conclusion that "significant differences exist in the substantive law of fraud" among the 49 states where defendant's fraud was alleged to have occurred. *See also* authorities cited in Brief in Chief at 14 n.14.

F.Supp. 2d ___ (S.D. Ind. Nov. 28, 2001)" as a "recently" decided example.[14] It is on this basis that Plaintiffs assert:

> In citing *Bridgestone/Firestone,* the district court herein was resolving the manageability concern by concluding that the law of Michigan (the state of DCC's principal place of business) would govern.

Answer Brief at 11. Plaintiffs have apparently become dissatisfied with the opinion they drafted for the trial court, since the court's decision does not even mention the law of the State of Michigan.[15]

But even if the trial court had held that only Michigan law applied to all class members' claims, that holding could not be sustained. No state in the country subscribes to such a choice of law jurisprudence, as the Seventh Circuit poignantly observed in reversing the *Bridgestone* district court decision upon which Plaintiffs rely. *Bridgestone*, 288 F.3d 1012, 1016 (7th Cir. 2002) ("Neither Indiana nor any other state has applied a uniform place-of-the-defendant's headquarters rule to products-liability cases."). *E.g.*, *Spence v. Glock*, 227 F.3d 309, 314-15 (5th

[11]

Cir. 2000) (reversing national class certification order on warranty claims for product design defect, applying Restatement choice of law analysis and rejecting the assertion that

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[14] Plaintiffs' trial court brief was devoid of authorities on choice of law. Instead, they told the district court that class members' claims were governed by the Uniform Commercial Code, which does "not differ from state to state." Plaintiffs' motion, p. 27, R.284.

[15] The contention that Michigan law applies to all class members' claims is an about-face from Plaintiffs' Petition, ¶44 (R.15), where they alleged that the applicable law included that of Oklahoma, Delaware, and the other states where class members reside.

the place of manufacture should control, holding *inter alia* that the court must consider the policies of the 50 interested jurisdictions); *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 497-98 (S.D. Ill. 1999) (denying national class certification order in product liability case, applying Restatement choice of law rules and rejecting plaintiffs' assertion that choice of law problem could be resolved by applying law of state of principal place of defendants' businesses); *Phillips v. General Motors Corp.*, 995 P.2d 1002, 1011-12 (Mont. 2000)(applying Restatement choice of law analysis in automotive products liability case, rejecting importance of place of manufacture of automobile for numerous public policy reasons, noting that "[o]ther courts have observed that applying the law of the place of manufacture would be unfair because it would tend to leave victims under compensated as states wishing to attract and hold manufacturing companies would raise the threshold of liability and reduce compensation."). As stated in *Lyon v. Caterpillar*, 194 F.R.D. 206, 215 (E.D. Pa. 2000), in denying class certification based on Restatement choice of law analysis on claims for consumer fraud, "[t]he domicile, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant."[16]

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[16] *See also Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1360 (8th Cir. 1994) (rejecting argument that the law of defendant's home state and where product was designed should control product liability action under Restatement choice of law analysis); *In re Mansonite Corp. Hardboard Siding Products Liab. Litigation*, 21 F.Supp. 2d 593, 598 (E.D. La. 1998) (rejecting argument that state of manufacture of siding should control warranty claims, applying Restatement choice of law rules under Florida law); *Rush Presbyterian-St. Luke's Medical Center v. Gould, Inc.*, 1995 WL 340967 at *4 (N.D. Ill. 1995) (rejecting argument that state where defendant's home office should control, applying three separate choice of law analyses, emphasizing that "Illinois has a compelling interest to adjudicate claims for damages arising out of allegedly defective equipment brought into its boundaries").

[12]

In the *Bridgestone* district court decision upon which Plaintiffs rely, the lower court applied a modified version of the choice of law standards tracking Restatement (Second) Conflicts of Laws (155 F.Supp. 2d 1069, 1078-79). The Seventh Circuit first rejected the lower court's analysis, not only because Indiana would apply *lex loci delicti* in all but exceptional cases, 288 F.3d at 1016—but also assuming *arguendo* the applicability of the *modified* analysis urged by plaintiffs and adopted by the trial court, applying "other factors, such as the place of the conduct causing the injury and the residence of the parties." *Id.*[17] *The* court noted that Indiana courts had applied Indiana law when injury caused by a defective product occurred in Indiana, and that no state had applied a "uniform place-of-the defendant's headquarters" rule in products liability cases. *Id.* The court persuasively reasoned, in language that would apply equally here (substituting "Oklahoma" for "Indiana"):

> We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers; nor do we think it likely that Indiana would apply Korean law (no matter what Korean law on the subject may provide) to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana, or French law to the sale of cars equipped with Michelin tires.

Id., 288 F.3d at 1010.[18]

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[17] Thus Plaintiffs here are in error in asserting that the Seventh Circuit never reached the modified Restatement analysis which was the basis of the trial court's decision. *See* Answer Brief at 13 n.18.

[18] Indeed, application of Michigan law to fraud and warranty claims of more than 1,000,000 class members residing throughout the nation would have constitutional implications under *Phillips*

[Footnote continued on next page]

[13]

Plaintiffs do not dispute applicability of Oklahoma's "most significant relationship" test to their fraud claim. "Thus, individuality of issues will predominate not only as to proof but also as to the very elements necessary to establish fraud."[19] Nor do Plaintiffs dispute, as to the warranty claim, the authority Defendants cited which hold that Oklahoma will apply the law of the state where the product was delivered or where the parties' relationship is centered.[20] Oklahoma choice of law rules give due weight to protection for the interests of the state where plaintiff resides and where the transaction giving rise to the cause of action occurs. *See NMP Corp. v. Parametric Technology Corp.*, 958 F.Supp. 1536, 1543-44 (N.D. Okla. 1997) (applying Oklahoma choice of law rules to tort claim and selecting law of Oklahoma—where plaintiff was located and the transaction occurred—because Oklahoma had "a materially greater interest" than the state where defendant was located—even though this required *invalidation* of a contractual choice of law clause selecting *defendant's* home state).

* * * *

[Footnote continued from previous page]

Petroleum Co. v. Shutts, 472 U.S. 797, 816-22 (1985), since it would uniformly exalt the interests of the state of the defendant's headquarters over the interests of all other states, including plaintiffs residence, where plaintiff entered the transaction, where plaintiff relied upon representations, or where the subject of the lawsuit is situated.

[19] *KMC Leasing, Inc., supra*, 2000 OK 51, ¶26, 9 P.3d at 691.

[20] *Collins Radio Co. of Dallas, Tex. v. Bell*, 1980 OK CIV APP 57, 623 P.2d 1039, 1045-48. *See also* Defendants' Brief in Chief at 17 n.19, cases denying certification for nonresident warranty claims under U.C.C. choice of law analysis.

(3)

No. 03-1342

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under this Court's established precedent, a state is free to adopt and apply choice of law rules so long as there exists a significant aggregation of contacts, creating state interests, such that the resulting choice of law is neither arbitrary nor fundamentally unfair. In this case involving identical defective minivan airbags so dangerous that the petitioner refuses to even use them as replacement parts in these very vehicles, petitioner's own evidence established that the claims in this case are so related to Michigan that virtually all the evidence offered by either party in this case emanates from conduct occurring in Michigan. Faced with this evidence, the Oklahoma Supreme Court applied its preexisting choice of law rules (those set forth in the Restatement (Second) of Conflict of Laws) and determined that Michigan law applied to respondents' warranty claims and laws of the state of purchase applied to respondents' fraud claims. The questions presented are:

1. Does the application of the law of the state with contacts so significant that "virtually all of the evidence offered by either side" emanates from conduct occurring there comport with due process and this Court's decisions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)?

2. Does the application of the law of the state with contacts so significant that "virtually all of the evidence offered by either side" emanates from conduct occurring there constitute unconstitutional extraterritorial regulation in violation of the commerce clause?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the reasons noted herein, respondents, Sheryl Ysbrand and Mary Cooney, respectfully pray that this Court deny the petition filed by petitioner, DaimlerChrysler Corporation ("DCC") seeking review of the interlocutory rulings of the Oklahoma Supreme Court.

JURISDICTION

The ruling below represents an interlocutory appeal of the state trial court's decision to certify a class – a ruling that the Oklahoma Supreme Court recognized "remains subject to modification and 'may be altered or amended before the decision on the merits.'"[1] As the jurisdiction of this Court to review state court decisions extends only to "*[f]inal* judgments or decrees rendered by the highest court of a State," no jurisdiction exists for this Court to grant review.[2]

Recognizing the problem, DCC argues for the application of the fourth exception to finality recognized by this Court in *Cox Broad. Corp. v. Cohn,* which permits review when:

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue

[1] Pet. App. at 20a, n.8 (quoting Okla. Stat. tit. 12, § 2023(c)(1)).

[2] 28 U.S.C. § 1257(a) (emphasis added).

> by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.[3]

The *Cox* exceptions generally apply when "additional proceedings anticipated in the lower state courts . . . would not require the decision of other federal questions that might also require review by the Court at a later date," and the fourth exception is further limited by the requirement that "refusal [to] immediately to review the state-court decision might seriously erode federal policy."[4] For the reasons noted below, the fourth *Cox* exception is simply not applicable in this case.

As a preliminary matter, it is important to note that the jurisdictional arguments proffered by DCC provide no support for reviewing its extraterritorial regulation claim in this Court now. As will be noted herein,[5] DCC waived this claim by not raising it in its initial appellate brief below. As such, the Oklahoma Supreme Court did not address the claim. The fourth *Cox* exception is designed to prevent interlocutory holdings on important federal claims from becoming unreviewable precedent.[6] With respect to the extraterritorial regulation claim, however, there simply is no state court holding to become unreviewed

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[3] 420 U.S. 469, 482-83 (1975).

[4] 420 U.S. at 477, 483.

[5] *See, infra,* pp. 5-6.

[6] *Cox Broadcasting,* 420 U.S. at 485; *see also Southland Corp. v. Keating,* 465 U.S. 1, 7 (1984); *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 179-180 (1988).

precedent. In any event, with respect to both the extraterritorial regulation claim and the alleged improper application of *Phillips Petroleum Co. v. Shutts*,[7] the fourth *Cox* exception is simply not applicable in this case.

First, the federal issue has not been finally decided by the state court. The nature of the ruling is a class certification order which, as noted above, may be altered or amended before the decision on the merits. Class certification orders remain interlocutory because they are decided as "soon as practicable after the commencement of an action" brought as a class action.[8] In this case only minimal discovery was undertaken prior to the certification order. For this reason, this Court has held that appellate review of district court orders granting or denying class certification do not fall within the collateral order exception to the finality requirement of 28 U.S.C. § 1291.[9]

Second, review now is inappropriate as it is clear that this case presents other federal questions that might also require review by this Court at a later date. Regardless of which state's law applies to the underlying claims, DCC

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[7] 472 U.S. 797 (1985).

[8] Okla. Stat. tit. 12, § 2023(c)(1).

[9] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (reversing court of appeals decision to review opinion denying certification noting: "An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Second, the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . . For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case." (citations and footnotes omitted)); *cf.* Fed. R. Civ. P. 23(f) (1998 amendment legislatively overruling *Coopers & Lybrand* in federal court class actions).

contends that the claims of the named plaintiffs and the entire class are preempted by federal law. The motion to dismiss on this basis was denied by the trial court and might require review by this Court.[10] Moreover, class actions often raise a number of federal due process claims arising out of both the notice and opt-out process and the trial plan ultimately used.[11]

Application of this limitation of *Cox* is especially appropriate in this case. These other possible federal questions will remain even if this Court reverses the state courts' rulings on the federal issues raised herein as the holding below approving treatment of this case as a class action will still support class certification of narrower classes.[12] Even a complete reversal of the class certification would not preclude litigation (of these allegedly preempted claims) by the individual named plaintiffs. Because these federal questions (and any number of other federal issues) may require review by this Court after final judgment, it would be inappropriate to review this case under the fourth *Cox* exception at this early stage.

Reversal of the choice of law ruling on the federal issue would not be preclusive of any further litigation on the relevant cause of action. Rather, a choice of law decision would merely be "controlling [of] the nature and

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[10] *See* District Court Order Denying Motion to Dismiss, *Ysbrand v. DaimlerChrysler Corp.* (Feb. 14, 2002).

[11] *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 800-01 (1985) (addressing due process with respect to class notice).

[12] *See, e.g., In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763, 766 (7th Cir. 2003) (previous decision reversing choice of law ruling and denying national class certification "contemplated that states would certify narrower classes . . . ").

character of the claim" in the state proceedings still to come. The underlying UCC warranty claims exist whether the court applies Delaware, Oklahoma, or Michigan law. A ruling on choice of law is a "run-of-the-mine decision" that can await final judgment for review.[13] If these class certification decisions occur with the frequency that petitioner suggests, this Court will soon have the opportunity to review these issues upon review of a final judgment.[14]

Finally, DCC seeks certiorari based upon the claim that the state courts' decisions to apply Michigan law violate both due process under *Shutts* and the commerce clause's bar on regulation of conduct occurring wholly outside the boundaries of the state. This Court has no jurisdiction to review the alleged extraterritorial regulation claim as DCC failed to preserve this argument for review. The commerce clause argument was not raised in the trial court in opposition to certification.[15] Nor was improper extraterritorial regulation raised as a defense in petitioner's answer which was filed by DCC after it initiated its state court appeal.[16] While the argument was noted in its statement docketing the state court appeal,[17] DCC did not brief the argument that the application of Michigan law violated the commerce clause or otherwise constituted unconstitutional extraterritorial regulation.

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[13] *Florida v. Thomas*, 532 U.S. 774, 781 (2001).

[14] *See, e.g., Avery v. State Farm Mutual Automobile Insurance Co.*, 201 Ill.2d 560, 786 N.E.2d 180 (2002) (granting appeal to consider final judgment in favor of national class tried under single state's law).

[15] *See* Pet. App. 68a-73a (petitioner's trial court Opposition to Class Certification).

[16] *See* Pet. App. 74a-76a (petitioner's Answer filed March 26, 2002).

[17] *See* Pet. App. 88a-89a (Petition in Error filed March 15, 2002).

Petitioner's sole reference to the issue appeared as part of a policy argument that regulation by the National Highway Traffic Safety Administration was superior to class adjudication.[18] Because petitioner waived the constitutional extraterritorial regulation claim by not specifically raising it in its brief in chief, the Oklahoma Supreme Court did not address the claim in its opinion.[19] As such, this claim cannot be raised here.[20]

STATEMENT OF THE CASE

In 1996 and 1997, one hundred percent of all child airbag minivan deaths occurred in minivans manufactured by DCC. (TR 258, Exh. B at pp. 41-42) In addition, a significant number of adults, primarily of smaller stature, have also been killed or seriously injured by airbags in DCC minivans. (*Id.*) Respondents are the representatives of a class of the purchasers of 1996-1997 model minivans manufactured by DCC who seek remedies for the breach of

[18] *See* Pet. App. 88a-89a (petitioner's Brief in Chief noting "allowing one state to apply its laws in a manner which regulates automotive safety policy within the purview of NHTSA threatens basic principles of federalism – recognized in *Healey v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996)").

[19] *See* Okla. Sup. Ct. R. 1.11(k)(1) ("Issues raised in the Petition in Error but omitted from the brief may be deemed waived. Argument without supporting authority will not be considered.").

[20] *See Adams v. Robertson*, 520 U.S. 83 (1997) (with very rare exceptions, Supreme Court reviewing state court judgments will not consider petitioner's federal claim unless it was either addressed by or properly presented to state court; citation of relevant case in brief for entirely different argument is insufficient); Sup. Ct. Rule 14.1(a); *Blessing v. Freestone*, 520 U.S. 329, 340, n.3 (1997).

warranty committed by DCC in manufacturing, marketing, and selling these vehicles.

DCC manufactured and sold over one million of the subject minivans as family vehicles, each containing a passenger airbag that is defective and dangerous to humans (both children and smaller statured adults) who are not the 160 pound males for which the bag was designed. (TR 258, at p. 5 & Exh. A) This airbag is so dangerous that even DCC is unwilling to continue to use the components in these airbags as replacement parts in the very 1996-1997 vehicles that are the subject of this litigation. Instead, it uses a lower powered airbag as its official replacement part. (TR 258 at 6; *see also* Plaintiffs' Response to Defendants' Motion for Stay, p. 5 & Exh. B) Nor does DCC use this dangerous airbag as original equipment in its post-1997 minivans. (*Id.*) Like the replacement part, DCC started using depowered airbags as original equipment beginning in its 1998 minivans. (*Id.*) As DCC's current conduct establishes, neither technology nor governmental regulation required it to use the defective, overpowered airbag it chose.

Those seeking a solution to this problem from the National Highway Traffic Safety Administration ("NHTSA") were turned away based on "the need to allocate and prioritize NHTSA's limited resources."[21] Consequently, respondents turned to the courts and initiated the instant class action. Following the setting of an agreed schedule for the consideration of class certification, the trial court below certified this case as a class action. (Pet. App. at 3a-4a)

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[21] Denial of Motor Vehicle Defect Petition, 62 FR 41477, 41481 (Aug. 1, 1997).

In determining whether to certify this case as a class action, the courts below addressed the issue of what law applied to the fraud and warranty claims brought by respondents on behalf of the class. In making that determination, the Oklahoma courts applied Oklahoma's existing choice of law rules. With respect to both the warranty and fraud claims, the Oklahoma courts applied the tests set forth in the Restatement (Second) of Conflict of Laws. (*See* Pet. App. 11a, 14a) With respect to the fraud claims, the Oklahoma Supreme Court determined that Oklahoma's choice of law rules mandated the application of the laws of the purchaser's state. (*Id.* at 16a) With respect to the contract based warranty claims, the Oklahoma Supreme Court determined that Michigan law applied to the warranty claims of all of the purchasers. (*Id.* at 13a-14a)

The decision that Oklahoma's previous adoption of the Second Restatement's "most significant relationship test" required the application of Michigan law to the warranty claims of each of the class members was based on a substantial record *provided by petitioner* regarding Michigan's relationship to each class member. While it is true that DCC is a Delaware corporation with its headquarters and principal place of business in Auburn Hills, Michigan, (Def. Class Cert. Ex. I, Van Der Wiele Affid., ¶ 1), the contacts between each class members' claim in this case and Michigan are even more substantial. For example, petitioner contended below that "[v]irtually all DCC personnel who may be called to testify in this matter are located in the State of Michigan." (*Id.* at ¶ 6) Similarly, DCC admitted that its personnel track the owners of the subject vehicles in Michigan, manage warranty work on the subject vehicles in Michigan, make design decisions

regarding the subject vehicles and the subject airbags in Michigan, and review and approve the marketing plans for the subject vehicles in Michigan. (*Id.* at ¶¶ 3, 6) Moreover, according to petitioner, virtually all of the millions of pages of documents requested by respondents in discovery are located in Michigan. (*Id.* at ¶ 4) Petitioner summed it up best when it argued below that this action is "*based on the design of airbags manufactured . . . by personnel located in Michigan,*" and "(t)hus, *virtually all the evidence offered by either side will relate to Chrysler's airbags and the adequacy of design decisions made in Michigan by Chrysler employees and third parties.*" (Chrysler Corporation's Reply to Plaintiff's Response to Motion To Dismiss, pp. 1, 6 (emphasis added)) Based upon this record the Oklahoma Supreme Court concluded that Michigan has the most significant relationship to the transaction and the parties with respect to each class members' claim because "Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made." (Pet. App. 13a, ¶ 15) Finally, the Court tested its application of the Oklahoma rule against this Court's constitutional limitations and found the determination "constitutionally permissible" under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). (*Id.* at 14a, ¶ 16). Following the denial of DCC's petition for rehearing below, DCC now seeks review in this Court.

REASONS FOR DENYING THE WRIT

The 51 state courts in our federal system are each expressly permitted to choose their own choice of law rule so long as the rule and its application do not violate

certain minimum standards. While petitioner offers a number of policy reasons why the rule chosen in this case was supposedly wrong, "*Ysbrand* is, by definition, a correct articulation and application of Oklahoma conflicts principles."[22] The question here is not whether this Court (or even the Michigan Supreme Court) would adopt the same rule – the question is whether the United States Constitution is offended by a state court applying the law of the state which is the source of "virtually all of the evidence offered by either side" in the case. The Oklahoma Supreme Court's decision to answer this question in the negative (especially in the context of an interlocutory ruling) is not one that is worthy of a grant of certiorari by this Court.

I. THE APPLICATION OF THE LAW OF THE STATE WITH CONTACTS SO SIGNIFICANT THAT "VIRTUALLY ALL OF THE EVIDENCE OFFERED BY EITHER SIDE" EMANATES FROM CONDUCT OCCURRING THERE COMPORTS WITH DUE PROCESS AND THIS COURT'S DECISIONS IN *SHUTTS* AND *ALLSTATE*.

A. The Decision Below Represents a Straightforward Application of this Court's Opinions in *Shutts* and *Allstate*.

In the decision below the court applied the Second Restatement test and found that Michigan had the most significant relationship to the transaction and the parties. The court then turned to the one constitutional challenge made by petitioners below. In addressing the issue, the

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[22] Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)*, 56 Okla. L. Rev. 289, 301 (2003).

Oklahoma Supreme Court correctly noted this Court's precedent regarding the constitutional limitations on choice of law decisions: "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[23] The court then found that the same factors that led to the conclusion that Michigan had the most significant state interest were sufficient to create a "significant aggregation of contacts" under *Shutts*. That these contacts exist and are sufficient in this case when "virtually all the evidence offered by either side" will emanate from Michigan cannot be seriously disputed.

The suggestion that the substantial contacts with Michigan in this case are insignificant is clearly frivolous. Thus, with respect to every class member, as "virtually all the evidence offered by either side will relate to . . . decisions made in Michigan," aggregation of the contacts is not necessary to comply with *Shutts* These identical contacts with Michigan (that are held by every class member) are clearly sufficient to distinguish this case from *Shutts* and the other cases cited by petitioner in which there were ***no*** significant contacts with state whose law was applied.

Because Petitioner cannot challenge the *results* of the application of the Oklahoma choice of law rule in this case, it seeks to distort the holding of both the court below and *Shutts*. Petitioner's argument is that by allegedly adopting

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[23] Pet. App. at 14a, ¶ 16 (quoting and citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

a special choice of law rule for class actions, the Oklahoma Supreme Court opinion violated *Shutts* regardless of the results of the rule. Both the premise and the conclusion are false.

First, the court below did not hold that the fact that this case was a class action allowed it to apply a different choice of law rule. What the court did do was apply sections 188(2) and 191 of the Second Restatement (the provisions dealing with contracts) and evaluate the relevant "contacts . . . according to their relative importance with respect to the particular issue[s]" involved in this case.[24] The court then checked its analysis by reviewing the general choice of law factors contained in section 6 of the Second Restatement and found that the general policies set forth in section 6 were not offended by the application of the result obtained under sections 181(2) and 191.[25] This analysis represents a straightforward application of the Second Restatement to this case, not an adoption of a special rule applying to class actions.

If there is any doubt, one need look no further than the court's analysis of the choice of law regarding the fraud claim. If the court was altering its ordinary choice of law rules to accommodate class action policies, the same alleged accommodation would have been applied to the choice of law determination on the fraud claims. Instead, the Court found that the Second Restatement test resulted in the application of the laws of 51 jurisdictions.[26]

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[24] *Id.* at 12a-13a, ¶¶ 13-15.

[25] *Id.* at 13a-14a, ¶ 16.

[26] *Id.* at 14a-16a, ¶¶ 17-18.

Contrary to the suggestion by petitioner, the due process clause analysis under *Shutts* does not require an examination and weighing of every contact with every class member – instead, it only requires that the law ultimately chosen be supported by "a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Thus, as long as the law ultimately chosen complies with the *Shutts*, due process did not require the courts below to individually examine all the contacts for each class member.

To the extent that *Shutts* imposes any constitutional requirement that there be an "individualized" choice of law analysis undertaken apart from assuring that significant contacts exist for each class members' claim, this requirement was met by the Oklahoma Supreme Court's consideration of the record submitted by the parties that allowed it to make conclusions regarding the relative interests of "each buyer's home state."[27] Moreover, as the nature of the dispute for every class member centers on the design and manufacture of the identical defective airbags in Michigan, the conclusion that the Michigan contacts are significant applies equally to every individual purchaser. Thus, as the record establishes that significant contacts with Michigan exist for every class member, "individual" analysis results in the same conclusion.

While the premise of DCC's argument (that the court below applied a different rule in a class action) is incorrect, so is the conclusion that due process would be offended if the status of this case as a class action influenced the outcome of the analysis. It should be noted that Second

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[27] *Id.* at 13a, ¶ 15.

Restatement § 6(g) allows consideration of the ease in the determination of the law to be applied. That due process does not require every Court to reach the same conclusion regarding choice of law is both obvious from the fact that each state has its own choice of law rules and an idea that was clearly and specifically rejected by this Court in *Shutts*.[28] Since due process does not mandate one national choice of law rule, due process does not prohibit choice of law rules that are applied differently when a case is brought as a class action based on considerations such as ease of application. While *Shutts* held that the status of a case as a class action could not be used to make a constitutionally impermissible choice of law permissible, this Court provided no restrictions on how a state decides between several constitutionally permissible choices of law. Under *Shutts,* due process merely requires a significant aggregation of contacts – a test easily met in this case regardless of whether the case is a class action.

Finally, petitioner argues that this Court's opinion in *Home Ins. Co. v. Dick,*[29] would preclude respondents from bring an individual suit in Oklahoma arguing that Michigan law applies. This is indeed a strange argument coming from petitioner who, with others in the automotive industry, commonly seek the application of Michigan law and its ban on punitive damages to non-Michigan purchasers

[28] *Shutts,* 472 U.S. at 823 (subject to limitation that choice of law be based on significant contact or significant aggregation of contacts, "we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law.").

[29] 281 U.S. 397 (1930).

when one of their defective products injure someone.[30] In any event, *Dick* is distinguishable from this case for the same reason as *Shutts*. Unlike this case, in *Dick* and *Shutts* the law to be applied bore no relationship to the parties or the transaction. On this record, Ms. Cooney, or any of the other class members, *could have* convinced an Oklahoma court to apply Michigan law to her individual dispute without running afoul of the due process clause because "virtually all of the evidence offered by either side" relating to the issues in dispute in the case would come from Michigan.

B. Whatever Conflict Exists Between the Decision of the Oklahoma Supreme Court and the Opinions of other State Supreme Courts and U.S. Courts of Appeals is Based Upon the Application of this Court's Opinions in *Shutts* and *Allstate* to the Facts of those Cases not Differences in Interpretation of *Shutts* and *Allstate*.

Petitioner has identified a number of decisions which apply different choice of law tests and reach different choice of law *conclusions*. The conclusions are different because the courts used different choice of law rules which were applied to different facts. With respect to the question here, whether the choice of law rule comports with *Shutts*, an analysis of these cases reveals consistent interpretation of the decision.

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[30] *See* Appellee's Combined Response to Briefs of Amicus Curiae, p. 9 & nn.27-29 and exhibits (citing examples of automotive manufacturers (including DCC) arguing for the application of Michigan law and its ban on punitive damages in non-class product liability suits brought outside of Michigan by non-Michigan purchasers).

One factor in reconciling the various decisions is the presence of choice of law rules that are different than the one applied by the court below – either in name[31] or application.[32] Another factor is the differing factual record in the cases rather the acceptance of a single state's law in the absence of contacts that would satisfy *Shutts*.[33] A third factor distinguishing the cases denying the application of a single state's law is an incomplete choice of law analysis by the court or the parties.[34]

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[31] *Compare, Ysbrand, supra* (applying Second Restatement test) *with Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1187-88 (9th Cir. 2001) (applying California's impairment of interests test); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir 1987) (applying Georgia's modified *lex loci delecti* rule); *cf. Clark v. TAP Pharmaceutical Products, Inc.*, 798 N.E.2d 123, 129-130 (Ill.App. 2003) (allowing Illinois consumer protection act to govern non-Illinois sales).

[32] *Compare Ysbrand, supra* (applying Second Restatement test resulting in application of single state's law) *with Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 697-698 (Tex. 2002) (refusing to find that state where products were manufactured and designed was state with most significant relationship under Second Restatement test).

[33] *Compare Ysbrand, supra* ("Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made."); *Clark, supra* (practices regarding "Lupron were designed, established, and initiated from the defendants' marketing and sales agents located at the defendants' corporate headquarters in Illinois"); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254-1255 (Ill.App. 2001) ("There is substantial evidence the deceptive claims practices were designed, established, and initiated from State Farm's corporate headquarters in Bloomington, Illinois") *with Zinser,* 253 F.3d at 1187 n.5 ("Although ARI is now headquartered in Colorado, Zinser has not demonstrated that it was headquartered there when the 854 leads were designed, manufactured, and distributed.")

[34] *Zinser,* 253 F.3d at 1188 ("Zinser does not explain how each non-forum state's law differs from California law, whether each non-forum state has an interest in having its law applied, or whether each non-forum state has an interest outweighing California's interest."); *Kirkpatrick, supra* ("although the law of Georgia might eventually be applied on some

(Continued on following page)

What is absent from the petitioner's review of these decisions is any meaningful analysis of how these decisions represent inconsistent interpretations of *Shutts* rather than the adoption and application of different state choice of law rules to different facts. As noted above, the appellate decisions accepting the argument that a single state law applies to a dispute all do so in the context of a record that supports compliance with *Shutts*. Similarly, the decisions rejecting the application of a single state's law do so based on non-constitutional grounds in spite of citations to *Shutts*.[35] The petitioner's premise – that when courts accept (or reject) application of a single state's law they have interpreted *Shutts* differently – is simply wrong.

Finally, petitioner makes many policy arguments against allowing courts to certify national class actions after finding a single state's law should apply. The reason behind the increase in class actions are new socioeconomic trends not "greedy lawyers" as even the author of the RAND study cited by petitioner recognizes.[36] In any event,

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claims involving purchases made in other states, that could be determined only after the district court had fully surveyed the law of the states of purchase."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016, n.90 (D.C. Cir. 1986) ("The judge did not say whether she had in mind applying the law of one particular state to all members of the nationwide class."); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 159 (Pa.Super. 2002) ("The record fails to reflect an analysis of the choice-of-law issue.").

[35] *See, e.g., Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 355 (Tex.App. 2003) (noting due process limits exist but deciding choice of law issue on state-law grounds).

[36] Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 212 (2001) (rejecting argument that class litigation is a "monster" and positing that large-scale litigation is consequence of socio-economic trends such as rise of multi-national corporations that bring with them potential for large-scale injuries and information science

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the choice between different constitutional policy decisions regarding the existence and venue for class claims is one for the state legislatures, state courts and Congress – not for this Court to review interlocutory class certification opinions from state courts.

II. THE APPLICATION OF THE LAW OF THE STATE WITH CONTACTS SO SIGNIFICANT THAT "VIRTUALLY ALL OF THE EVIDENCE OFFERED BY EITHER SIDE" EMANATES FROM CONDUCT OCCURRING THERE DOES NOT CONSTITUTE UNCONSTITUTIONAL EXTRATERRITORIAL REGULATION.

Petitioner's final constitutional argument is that the Oklahoma Supreme Court's choice of Michigan law violates the prohibition on the extraterritorial application of one state's law to conduct in another state. This argument is based on the unstated premise that there is no relationship between Michigan and this dispute. This premise and the legal conclusions drawn from it are false. Indeed, if this Court adopts DCC's argument, no state would be permitted to ever apply another state's law – a result that would ultimately conflict with this Court's holdings in *Shutts*.

Petitioner relies on *Healey v. Beer Institute, Inc.*,[37] *BMW v. Gore*,[38] *State Farm Mut. Auto. Ins. Co. v. Campbell*[39] and other similar opinions. The prohibitions in these

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revolution including development of the Internet, which have provided means for people to become informed of potential claims).

[37] 491 U.S. 324 (1989).

[38] 517 U.S. 559 (1996).

[39] ___ U.S. ___, 123 S. Ct. 1513 (2003).

opinions are not as broad as petitioner seeks to make them.

First, it is important to note that none of these opinions prohibit a state from applying another state's law so long as the dictates of *Shutts* are met. *Healey* merely prohibits the application of one state's law to conduct wholly occurring outside that state. Similarly, *Gore* prohibits a state from applying its law to punish wholly out-of-state conduct that was legal where it occurred, and *Campbell* holds that a state cannot apply its law to "punish a defendant for unlawful acts committed outside of the state's jurisdiction."[40] In this case, Michigan law applies because the conduct being regulated occurred there. For these reasons, the prohibitions in *Healy, Gore* and *Campbell* simply do not apply.

The argument being advanced based on these cases would lead to the conclusion that no state may ever apply another state's law to a dispute – a conclusion directly contrary to the holdings of *Shutts* and *Allstate* noted above. None of these cases bar a class action where a court determines that the law of one state applies nationally to the dispute. Indeed, petitioner's citation to *Campbell* on this point is particularly inappropriate as *Campbell* explicitly distinguished the case where all persons harmed by the conduct occurring outside the state were parties and the conduct was judged under a choice of law rule that complies with *Shutts*.[41] Thus, under *Campbell* a choice of law decision joining all the

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[40] 123 S. Ct. at 1522.

[41] *Campbell*, 123 S. Ct. at 1522 (citing *Shutts*, 472 U.S. at 821-822).

class members as parties and complying with *Shutts* does not constitute unconstitutional extraterritorial regulation.

There is nothing unconstitutional in this result. In any case involving contracts between citizens of different states, a court must choose which state's law to apply. Choosing to apply the law of the state where the seller resides is, from the standpoint of the commerce clause, no more suspect than choosing to apply the laws of the buyers' states. "The . . . modern approach is to recognize that contracts formed between citizens in different states implicate the regulatory interests of both states. Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract."[42] The choice of law decision simply involves balancing those interests, and "[w]hile a contract which covers multiple states may raise a difficult choice-of-law question, once that question is resolved there is nothing untoward about applying one state's law to the entire contract, even if it requires applying that state's law to activities outside the state."[43]

A contrary rule would not be workable as the resulting rule would be contrary to the holding in *Shutts*. In *Shutts*, the Court *required* the application of the foreign state's laws when the forum had no significant contacts with the parties or the dispute. Take the individual case of Ms.

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[42] *A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, 163 F.3d 780, 787 (3d Cir. 1999).

[43] *Instructional Systems, Inc. v. Computer Curriculum Corporation*, 35 F.3d 813, 825 (3d Cir. 1994); *accord, Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1225 (9th Cir. 2003).

Cooney, a Delaware resident. Under petitioner's *Shutts'* argument, the Oklahoma Court must apply Delaware law. Under the commerce clause argument advanced by petitioner, however, the application of Delaware law would constitute unconstitutional extraterritorial regulation by the Oklahoma court. To accept petitioner's argument would make choice of law determinations in many cases unworkable.

Petitioner also argues that both the commerce clause and the due process clause are violated by the holding of the opinion below because the courts of Oklahoma allegedly have insufficient contacts with the dispute of the non-Oklahoma class members. Petitioner cites no direct authority for either of these propositions. Petitioner's suggestion that the concurrence in *Allstate* requires more than that the law that the court ultimately applies be based on a significant contact or significant aggregation of contacts is directly contrary to *Shutts*.[44] This Court has never required the forum court to establish significant contacts in order to apply its choice of law rule. The presence of the case in the forum is sufficient to allow the court to pick the choice of law rule as long as the result of the application of the rule does not violate the due process test set forth in *Shutts*.[45]

This Court has traditionally refused to graft constitutional requirements beyond compliance with *Shutts* to choice of law decisions. For example, in *Franchise Tax*

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[44] *Shutts*, 472 U.S. at 823; *see also Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) (rejecting federal conflict of law rule in diversity cases).

[45] *Cf. Klaxon Co., supra* (requiring federal courts in diversity cases to uniformly apply the conflict of law rule of forum state).

Board of California v. Hyatt, this Court rejected a claim that the choice of law violated the full faith and credit clause holding that any choice of law that satisfies *Shutts* cannot, by definition, violate the clause.[46]

Moreover, the supposed "substantive conflict" between the different laws is largely illusory. Indeed, in a decision of the Ninth Circuit when petitioner supported class adjudication through a national settlement of automobile warranty claims, the court noted that the laws of the various states are "generally homogenous" and the "idiosyncratic differences" between the laws of the states are not "sufficiently substantive" to create significant differences in the claims of the class members.[47]

Implicit in petitioner's argument is the assumption that the national class certification in this case is significant. One wonders if the court below had merely ruled that the contract claims of Cheryl Ysbrand of Oklahoma and Mary Cooney of Delaware were governed by Michigan law when "virtually all the evidence offered by either side" will emanate from Michigan would have triggered this objection. Of course the answer is no, and, indeed, the suggestion that class certification changes the constitutionality of the choice of law analysis is contrary to petitioner's argument that class certification should be ignored in conducting choice of law analysis.

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[46] ___ U.S. ___, 123 S. Ct. 1683 (2003).

[47] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-1023 (9th Cir. 1998).

CONCLUSION

The arguments raised by petitioner are both procedurally inappropriate and substantively without merit. Consequently, this Court should deny the petition.

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The sum of respondents' argument in opposition to certiorari is that the petition is premature: that this Court's review will not be warranted until more lower courts endorse the Supreme Court of Oklahoma's errant analysis, and until after some nationwide class action is litigated to verdict and appealed through the state judiciary. But the willingness of even a *single* jurisdiction to certify nationwide class actions in violation of the Constitution threatens to hold the entire American economy hostage to parochial whim. *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003) (Easterbrook, J.). Oklahoma and the minority of jurisdictions that have departed from this Court's holdings in such cases as *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), have created magnets for nationwide class litigation. Those jurisdictions will continue to set policy for the entire country unless and until this Court resolves the conflict. This case presents an appropriate vehicle for this Court to do precisely that.

I. The Conflict Among Federal And State Courts Has Widened Since The Petition Was Filed

Respondents barely address the divide among federal and state courts concerning constitutional restraints on nationwide-class certification; respondents focus instead on the merits of the constitutional issue. But they do not refute the need for this Court to resolve the conflict, which was already developed when the petition was filed: Oklahoma and Illinois take a position diametrically opposed to most other jurisdictions' (and California takes an intermediate stance). *See* Pet. 13-20. The divide has only *widened* since that time: expressly relying on the federal Due Process Clause, the Supreme Court of Texas recently de-certified a nationwide class of plaintiffs asserting *precisely the same type of Uniform Commercial Code warranty claim* as in this case.

1. In *Compaq Computer Corp. v. Lapray*, No. 02-0705, __ S.W.3d __, 2004 Tex. LEXIS 435 (May 7, 2004), the plaintiffs sought certification of a nationwide class based on the UCC's warranty provisions as adopted in Texas, where Compaq was headquartered. As in this case, the warranty claims were based on "unmanifested defects." And, as Oklahoma does, Texas applies the *Restatement*'s "most significant relationship" test for choice of law. Nonetheless, after the trial court certified a nationwide class, the Supreme Court of Texas unanimously reversed, holding that the *Restatement*'s test could not constitutionally be applied as urged by the plaintiffs. *Id.* at *62-*66.

The Texas Supreme Court began from the proposition that "[t]he Due Process Clause limits the extent to which one state's law can be applied to claims that arise in many states." 2004 Tex. LEXIS 435, at *62-*63 (citing *Shutts*, 472 U.S. at 821-22). Examining the contacts between Texas and the individual claims against Compaq, the court then held that the mere presence of Compaq's headquarters in Texas was insufficient to warrant classwide application of Texas law. All of the plaintiffs' home States "are likely to be interested in ensuring that their consumers are adequately compensated for a breach of warranty"; indeed, some may conclude that "Texas law may not provide sufficient consumer protection." *Id.* at *64-*65. The court therefore concluded that "the class representatives ha[d] failed to demonstrate [Texas law] will apply to the claims of out-of-state class members," and held that each plaintiff's claim would be governed by the law of that plaintiff's home State. *Id.* at *64-*66.

Significantly, the Texas court also determined that the fifty States have adopted substantively different interpretations of the UCC's warranty provision—and specifically that many States do not recognize the type of "no-injury" claims based on unmanifested alleged defects that are at issue in *Compaq* and in this case. 2004 Tex. LEXIS 435, at *60-*62.

Compaq thus is directly contrary to the decision below, and to respondents' position, in two key respects. First, it directly contradicts their attempt to explain the divide in the lower courts as "courts us[ing] different choice of law rules which were applied to different facts." Opp. 15. *Compaq* considered a warranty claim just like the respondents' and applied the *Restatement* just as the opinion below purported to do, but—invoking federal constitutional limits on those choice of law principles—reached the opposite result.

Second, *Compaq* compellingly refutes respondents' assertion that "the supposed 'substantive conflict' between the different laws is largely illusory." Opp. 22. The Texas court showed in detail that the laws of the fifty States are in conflict concerning the availability of "no-injury" warranty claims. "Some states may recognize such claims, but we cannot say that all fifty-one jurisdictions would." 2004 Tex. LEXIS 435, at *61; *see also* Pet. 22; *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 803-04 (E.D. La. 1998) (citing cases). *Compaq* therefore confirms that the Oklahoma court's failure to undertake a choice of law analysis consistent with due process principles was not a harmless error, because the selection of Michigan law would be outcome-determinative for many plaintiffs. *See, e.g.*, *Shutts*, 472 U.S. at 816. Indeed, while in *Compaq* the court declined to hold that *Texas* permits recovery for unmanifested defects (*see* 2004 Tex. LEXIS 435, at *61 & n.15), across the Red River to the north, the courts of Oklahoma will allow *Texas plaintiffs* to recover on just such claims, so long as they sue as part of a nationwide class.[1]

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[1] Respondents also ignore the conflict among the federal courts of appeals and state courts of last resort that existed even before *Compaq*. Pet. 10-18. These courts are divided over whether the Constitution requires "an individualized choice of law analysis" with respect to "each plaintiff's claims." *Georgine v.*

2. Respondents also resist certiorari on the ground that the Oklahoma Supreme Court *did not* adopt "a special [choice of law] rule applying to class actions." Opp. 12. That assertion is demonstrably false. While the Oklahoma court did note that "Michigan is the only state where conduct relevant to all class members occurred" (Pet. App. 13a), as respondents observe, the only "relevant" conduct under that analysis was the presence of DCC's headquarters in Michigan, and the concomitant management decisions typically made in *any* company's headquarters. The key to the choice of law rule adopted below, as the court stressed, is that by design it selects a body of substantive law that overrides conflicting laws in other States: the rule "require[s] that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions." *Id.* at 13a-14a. This analysis specifically subordinates the regulatory interests of each plaintiff's home State to the goal of a single, nationwide adjudication.[2]

3. When respondents at last acknowledge the special class-friendly choice of law rule adopted in the decision below, they simply contend that such a rule comports with the Constitution. Opp. 13. That contention, even if correct, would be irrelevant for purposes of certiorari: this Court's review would be warranted to resolve the conflict that respondents ignore, even if the decision below were ultimately to be affirmed on the merits. *See* SUP. CT. R. 10(b).

In fact, however, the Oklahoma Supreme Court's decision also conflicts with this Court's constitutional holdings.

Amchem Prods., 83 F.3d 610, 627 (3d Cir. 1996) (citing *Shutts*), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

[2] Respondents derive no benefit from the fact that the court below did not apply its special class-friendly rule to respondents' fraud claims. Opp. 12. The Oklahoma court's holding is not justified by the mere fact that its error was not compounded.

Respondents attempt to square the decision below with *Shutts*; *Healy v. Beer Institute*, 491 U.S. 324 (1989); and other cases by focusing on the fact that DCC is headquartered in Michigan. On respondents' reasoning, the Constitution *always* permits *any* court to apply Michigan law to *any* Michigan company, irrespective of the identity of the other parties or the interests of other States—and despite Michigan's *objections*, presented below and renewed in this Court.[3]

Under *Shutts*, Oklahoma plainly could *not* apply its *own* law to the plaintiff class, overriding the law of the other States with interests at stake. The same constitutional considerations preclude it from selecting *another* State's law to apply to the entire plaintiff class without an individualized analysis of the various interests at stake. If none of the States with conceivable interests in the regulated transaction—including Michigan, *see* Br. for Michigan 2—would apply Michigan law to out-of-state plaintiffs' claims, then Okla-

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[3] Respondents repeatedly emphasize that much of the *evidence* that would be adduced at trial would come from Michigan. But that shows only that the Oklahoma courts are an inconvenient forum, *not* that Michigan has sufficient contacts with the *transactions* at issue here (minivan sales occurring at dealerships throughout our Nation) to justify applying Michigan law. And to say that *DCC* has contacts with Michigan is not to say that any State in the Union would apply Michigan law to a Delaware plaintiff's warranty claim against DCC. Indeed, contrary to respondents' theory that any State can apply its law to transactions occurring *elsewhere* between companies headquartered in that State and citizens of other States, this Court's Commerce Clause cases carefully delimit individual States' authority to regulate corporate affairs: the state of *incorporation* (not of headquarters) can regulate purely *internal* corporate affairs such as the fiduciary duties of board members or the legal requirements for mergers. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *see id.* at 93 (a State "has no interest" in applying its law to corporations incorporated elsewhere).

homa's choice of Michigan law to govern the nationwide class *solely because it facilitates the certification of a nationwide class* is entirely arbitrary. This form of arbitrariness, in which a different substantive law is applied based entirely on the plaintiffs' election of a forum (that itself has only a tenuous connection to the litigation), is squarely what *Shutts* forbids. *See Shutts*, 472 U.S. at 820 ("If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." (internal quotation marks omitted; alteration in original)); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

The nationwide scope of the class makes the choice of law all the more constitutionally indefensible. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-22 (2003). Respondents claim that *Campbell* in fact authorizes their nationwide class, because class certification makes all persons who would be affected by the resulting extraterritorial regulation parties to the action. Opp. 19. But respondents gloss over *Campbell*'s statement that "to those parties, the Utah courts, in the usual case, would need to apply *the laws of their relevant jurisdiction*." 538 U.S. at 421-22 (emphasis added). Nationwide class certification does not cure the constitutional defect addressed in *Campbell* unless the forum State applies an individualized choice of law analysis that respects "each State['s] . . . own reasoned judgment about what conduct is permitted or proscribed within its borders." *Id.* at 422.

II. The Judgment Below Is Final For Purposes Of This Court's Review

As the petition demonstrates—and as respondents tellingly do not rebut—this Court has jurisdiction at this stage of litigation when, as in this case, the basic authority of a state court to adjudicate specific claims between specific litigants is at issue. For example, the Court has granted certiorari to determine whether state courts possess the authority to adju-

dicate a dispute or instead are required to refer it to arbitration, lack personal jurisdiction to adjudicate claims against a defendant under the Due Process Clause, and lack authority to adjudicate a claim where federal law compels a change of venue. *See* Pet. 28 (citing cases). As those cases teach, this Court's review is appropriate where, as here, litigants would be subjected to "long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

The federal issues implicated by the decision below are deserving of immediate review because they are just as significant as the issues raised in these other cases, *if not more so*.[4] As with these other cases, reversal of the decision below on the federal question would be preclusive of further litigation on the specific causes of action at issue. *See* Pet. 28. Following a constitutionally adequate choice of law analysis, neither named respondent could maintain *any* cause of action under *Michigan* warranty law in the Oklahoma court; the claims at issue here would be terminated. *See id.* at 27.

Respondents' assertion that *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), precludes review is plainly incorrect. *Livesay* held only that class certification orders are not reviewable as of right in the federal courts of appeals under the collateral order doctrine that this Court applies pursuant to 28 U.S.C. § 1291. But this Court's collateral-order decisions are appropriately informed by the recognition that permitting such appeals as of right would result in the routine interruption of trial court proceedings for appellate review. *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 429-30

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[4] Respondents' citation of *Florida v. Thomas*, 532 U.S. 774, 781 (2001), for the proposition that choice of law issues are "run-of-the-mine" is inapposite. *See id.* at 780 (concerning suppression of evidence in criminal trials, and not choice of law issues).

(1985).[5] No such consideration impedes this Court's exercise of jurisdiction here: Oklahoma already permits interlocutory appeal in cases like this, and despite the potential availability of further proceedings, this Court's "pragmatic approach" to finality questions under 28 U.S.C. § 1257 (*Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975)) clearly permits this Court to review the important federal issues that the Oklahoma courts have determined finally and adversely to DCC—as the cases amply demonstrate. *See* Pet. 28-29.[6]

Indeed, to the extent the federal model of finality is relevant here, this Court's "pragmatic approach" to finality questions under § 1257 suggests that this Court's promulgation of Federal Rule of Civil Procedure 23(f) in 1998 is far more relevant than its inapposite "collateral order" analysis in *Livesay* 26 years ago. With Rule 23(f), this Court recognized that certification of a large class creates enormous incentives to settle "even when the plaintiff's probability of success on the merits is slight" (*Blair v. Equifax Check Servs.*, 181 F.3d 832, 834 (7th Cir. 1999)), so that appellate review of an order granting class certification is often impossible if not permitted immediately. *See* FED. R. CIV. P. 23(f) advisory committee notes. Respondents are silent regarding this Court's practical recognition of this settlement reality.[7]

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[5] *Cf.* 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4008, at 148 (2d ed. 1996) ("[I]t is no longer possible, if ever it was, to treat [§ 1257 and § 1291] precedents as fungible.").

[6] Respondents also claim that the certification order is not "final" because the trial court could revisit it. Opp. 3. But the federal question has been finally decided: the ruling on the constitutional issues is now law of the case, and because DCC's Michigan headquarters was the entire premise for that ruling, no new evidence that might later be developed will reopen *that* question.

[7] Respondents posit that a nationwide class may someday reach this Court for review after a final judgment, but in all of re-

III. The Constitutional Issues Are Preserved

Respondents do not dispute that DCC properly preserved the argument that the Due Process Clause bars the nationwide class certification. Yet they assert that this Court "has no jurisdiction" to review the related Commerce Clause argument because, they claim, it was not separately preserved in the Oklahoma courts. Opp. 5. Respondents are wrong.

DCC specifically listed the Commerce Clause argument as one of the issues it would raise in the Supreme Court of Oklahoma, Pet. App. 88a-89a, and proceeded to do so in its Brief in Chief. DCC asserted that because the Commerce Clause (and the Due Process Clause) confers upon Congress, not the States, the power to regulate interstate commerce, the plaintiffs' attempt to use a nationwide class action to project one State's regulatory scheme onto the national economy was inappropriate. *See id.* at 99a-100a (citing *Healy*, the most apposite Commerce Clause case). Rather, respecting the congressional power over interstate commerce requires that nationwide claims of motor vehicle defects be resolved according to the structure Congress established, *i.e.*, through NHTSA. *See* Pet. 2. This is not a "policy argument," as respondents contend (Opp. 6), but a legal one, directly applying constitutional law to explain why the nationwide class was not a "superior form of adjudication" and should not have been certified. And the court passed on that argument, holding that "the needs of the interstate system" demand only a single nationwide *result* and that a nationwide class action can achieve that result. Pet. App. 13a-14a.[8] The Commerce Clause issue is properly before this Court.

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corded history they can find only a *single* nationwide class action (still on appeal) that was actually litigated to verdict—hardly sufficient to ensure review of the federal issues raised in this case.

[8] Seeking rehearing below, DCC repeated the Commerce Clause argument at length. Pet. for Reh'g 8-12. Respondents an-

In any event, respondents effectively concede—as they must—that DCC properly pressed a federal issue (due process) throughout the proceedings below, *see* Opp. 5; *see also* Pet. 4 n.2 (citing pleadings), and that the Oklahoma Supreme Court passed on that issue, Pet. App. 14a. Thus, there can be no doubt about this Court's *jurisdiction* to hear this case. Respondents' "jurisdictional" objection reduces to the novel notion that DCC somehow was required to invoke the restraints on extraterritorial regulation imposed by the Commerce Clause *separately* from those imposed by the Due Process Clause. But this Court's decisions do not support any such bright-line distinction; the two provisions closely intersect in this area. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996) (imposing due process restraints on extraterritorial regulation and citing as authority Commerce Clause cases such as *Healy* and *Edgar v. MITE Corp.*); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (reviewing constitutional challenge to extraterritorial taxation under "[t]he Due Process and Commerce Clauses"); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (same, "[u]nder both the Due Process and the Commerce Clauses"); *cf. Boynton v. Virginia*, 364 U.S. 454, 457 (1960) ("closely related" claims are "considered within the scope of the issues presented to the State Supreme Court"). The petition accordingly raises both Clauses, and both are properly the subject of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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swered on the merits and never raised any "preservation" objection. *See* Resp. to Pet. for Reh'g 7-10. Their only procedural argument was that the decision was not final, Resp. to Mot. to Stay Mandate 2-5; the court stayed its mandate despite that contention.

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In The Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

AMICUS CURIAE BRIEF OF THE OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY, INC. IN SUPPORT OF DAIMLERCHRYSLER CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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AMICUS CURIAE BRIEF OF THE OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY, INC. IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

This *amicus curiae* brief is submitted on behalf of The Oklahoma State Chamber of Commerce and Industry, Inc. ("The Oklahoma Chamber").[1] Petitioner DaimlerChrysler Corporation ("DCC") has consented to the filing of this brief, and a letter from DCC's counsel reflecting this consent has been filed with the Clerk of the Court. Respondents, Sheryl Ysbrand and Mary Cooney, Individually and on Behalf of All Others Similarly Situated, have also consented to the filing of this brief, and a letter from Respondents' counsel reflecting this consent has also been filed with the Clerk of the Court. This brief is therefore being filed pursuant to Supreme Court Rule 37.2(a).

I. INTEREST OF *AMICUS CURIAE*

The Oklahoma Chamber, which also serves as the State Manufacturers' Association for all Oklahoma businesses, is a not-for-profit association organized under 26 U.S.C. § 501(c)(6). The 78-year-old organization was the nation's first accredited state chamber. Its membership includes more than 2,000 individual business locations in 25 states.

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[1] This brief was authored in whole by outside counsel for *amicus curiae*, the Oklahoma Chamber. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

The Oklahoma Chamber has a strong interest in the development of rational standards of liability that enhance, and do not harm, the economy. The Oklahoma Chamber often advocates positions on questions of significant importance to Oklahoma's business community. *See* The State Chamber, *Champion Program: Initiative Two* (2004), *available at* http://www.okstatechamber.com/file_upload/InitativeTwo.pdf (last visited April 7, 2004). The fact that its members have been named as defendants in class action lawsuits gives The Oklahoma Chamber a unique interest in further educating this Court about the issues presented in DCC's Petition for a Writ of Certiorari.

II. SUMMARY OF ARGUMENT

In its decision in *Ysbrand v. Daimlerchrysler Corp.*, 2003 OK 17, 81 P.2d 618 (the "Oklahoma *Ysbrand* opinion"), the Supreme Court of Oklahoma found that the law of the principal place of business of the manufacturer applies to *all* proposed class members' claims for breach of warranty under the Uniform Commercial Code, regardless of the residency of the claimants or where the sales took place. The court therefore found that there were issues of law common to the proposed class. Based in part upon that finding, the court affirmed certification of a class of plaintiffs domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia who could assert the "no injury" breach of warranty claims asserted by the named plaintiffs.

Many jurisdictions do not permit a manufacturer to be held liable for claims of breach of warranty where there is no injury. For an Oklahoma court to hold a manufacturer liable to a nationwide class of plaintiffs – most of whom

are not residents of the State of Oklahoma and did not purchase the subject products in the State of Oklahoma – for conduct that would not be actionable if the manufacturer were sued in individual actions in other jurisdictions, is a violation of Due Process. The Oklahoma *Ysbrand* decision, if allowed to stand, will thus have the effect of diluting Due Process protections affecting manufacturing businesses that may be subject to the jurisdiction of Oklahoma courts. That decision decides this important federal question in a way that is contrary to relevant decisions of this Court, another state court of last resort and several United States Courts of Appeals.

The Oklahoma *Ysbrand* decision, if left undisturbed, will likely make Oklahoma an extraordinarily attractive forum for filing class action lawsuits for breach of warranty. On the other hand, it will likely make Oklahoma an unattractive location for manufacturers to conduct business. This court-sanctioned dilution of Due Process protections undoubtedly will affect the decisions of manufacturing businesses relating to actions that could give Oklahoma courts jurisdiction over those businesses, such as whether to locate and/or to remain in Oklahoma and whether to sell products to companies and persons in Oklahoma or conduct any other business activities in Oklahoma. The Oklahoma Chamber requests that this Court consider the points raised in this *amicus curiae* brief and grant DCC's Petition for a Writ of Certiorari.

III. ARGUMENT

PROPOSITION ONE: THE OKLAHOMA *YSBRAND* DECISION DILUTES A MANUFACTURER'S DUE PROCESS PROTECTIONS.

The Due Process Clause of the United States Constitution provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. DCC Appendix D. As noted by this Court in *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 572, n. 17 (1996), "State power may be exercised as much by a jury's application of a state rule of law in a civil suit as by a statute."

In the Oklahoma *Ysbrand* decision, the Supreme Court of Oklahoma found that the law of the principal place of business of the manufacturer applies to claims for breach of warranty under the Uniform Commercial Code by "[a]ll entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia," who purchased the described "minivan" and are not otherwise excluded from the class. DCC Appendix A at 3a-4a. The decision to apply the law of the principal place of business of the manufacturer to the claims of all proposed class members, even if that law would not be applied if separate lawsuits were filed by individual plaintiffs, allows the exercise of State power in a way that dilutes the protections afforded by Due Process.

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), this Court was asked to determine whether the application of Kansas law to the claims of all proposed class members would violate constitutional protections, including Due Process. This Court stated, "We must *first* determine whether Kansas law conflicts in any material

way with any other law which could apply." *Id.* at 816 (emphasis added). This Court noted that the laws of Texas and Oklahoma, which the petitioner argued should be applied to many of the claims, conflicted with Kansas law. Application of Texas law "would vastly reduce petitioner's liability" *Id.* at 817. Further, according to petitioner, applying Kansas law to all claims could create liability that would not exist under Oklahoma law. *Id.* This Court then stated:

> Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate [Ins. Co. v. Hague],* 449 U.S. [302] at 312-313 [1981]. Given Kansas' lack of "interest" in claims unrelated to that State, *and the substantive conflict with jurisdictions such as Texas,* we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

472 U.S. at 821-22 (emphasis added).

Here, the claims of the members of the proposed class are for breach of warranty due to allegedly defective air bags in certain minivans. Those excluded from the class include "those who have suffered personal injury from air bag deployment." DCC Appendix A at 3a-4a. Respondents allege that the airbags in their vehicles are potentially dangerous, but they deny having been injured by the airbags. DCC Appendix C at 50a-52a, 54a-57a, 59a. Respondents do not allege that the airbags in their vehicles have malfunctioned, but contend that they "have been harmed economically as they have not received the vehicles

they contracted for and instead have been misled into purchasing vehicles with a diminished value." *Id.* at 59a. Respondents seek "economic damages compensating them for the cost to repair their vehicles [and] diminution in value of their vehicles. . . ." *Id.* at 50a.

Many, if not most, jurisdictions that have considered the viability of such "no injury" economic-loss-only warranty claims have refused to recognize them, holding that purchasers of an allegedly defective product do not have a cognizable claim if the defect has not manifested itself in the product they own. *See, e.g., Yost v. General Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986) ("damage is a necessary element of both counts – breach of warranty and common law fraud"); *Jarman v. United Industries Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (plaintiff did not have a claim for breach of warranty because, "unless there is actually a failure in product performance, there is no basis at all for claiming that the plaintiff has been damaged in any way"); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 602 (D.C.N.Y. 1982) (under New York's version of the Uniform Commercial Code, "[t]ires which lived full, productive lives were, by demonstration and definition, 'fit for the ordinary purposes' for which they were used; hence they were 'merchantable' . . . , and no cause of action for breach of an implied warranty can arise"); *Carlson v. General Motors Corp.*, 883 F.2d 287, 297 (4th Cir. 1989) (no claim for breach of implied warranty of merchantability for plaintiffs who alleged damages attributable only to "lost resale value"); *In re Air Bag Products Liability Litigation,* 7 F. Supp. 2d 792 (E.D. La. 1998) (plaintiffs could not state a claim under either Louisiana or Texas law for economic loss from allegedly defective air bags).

As this Court stated in *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996), "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* at 573, n. 19, *citing Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). That is precisely what the Oklahoma *Ysbrand* decision permits.

Respondents have argued, and Petitioner disputes, that Michigan is in the minority and will permit a "no injury" claim. If Respondents are correct in their interpretation of Michigan law, and if the Oklahoma *Ysbrand* decision is allowed to stand, DCC could be found liable to plaintiffs residing in all 50 States and the District of Columbia for conduct that would not be actionable if DCC were sued in individual actions in jurisdictions applying a different law. That would be a Due Process violation "of the most basic sort." *See BMW,* 517 U.S. at 573, n. 19. The Oklahoma Chamber requests that this Court grant DCC's Petition for a Writ of Certiorari in order to consider the Due Process rights of DCC and other manufacturers to whom the Oklahoma *Ysbrand* decision, if allowed to stand, may be applied.

PROPOSITION TWO: THE OKLAHOMA *YSBRAND* DECISION DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, A DECISION OF ANOTHER STATE COURT OF LAST RESORT, AND DECISIONS OF UNITED STATES COURTS OF APPEAL.

Rule 10(b) and (c) of the Rules of the Supreme Court of the United States provides, in relevant part, that considerations governing review on certiorari include the following:

> a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals; [and that] a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Those considerations apply here.

The Oklahoma *Ysbrand* decision decides an important federal question. Had the Supreme Court of Oklahoma concluded, in accordance with the decisions of many other jurisdictions, that the laws of the many states in which the individual plaintiffs purchased their vehicles applied, it would not have been able to grant class certification. By finding, however, that the law of the principal place of business of the manufacturer applies to each of the purported class plaintiffs' claims for breach of warranty, regardless of the residency of the plaintiffs or where the sales took place, the Supreme Court of Oklahoma has decided an important federal question relating to Due Process protections of manufacturers.

The Oklahoma *Ysbrand* decision decides this important federal Due Process question in a way that conflicts with relevant decisions of this Court. That decision conflicts with the decision of this Court in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), in that the Supreme Court of Oklahoma did not "first determine whether [Michigan] law conflicts in any material way with any other law which could apply." *Id.* at 816. Neither did the Supreme Court of Oklahoma follow the rule in *Shutts* that "[Michigan] must have a significant contact or significant aggregation of contacts to the claims asserted by *each member of the class,* contacts creating state interests, in

order to ensure that the choice of [Michigan] law is not arbitrary or unfair." *Id.* at 821-22 (emphasis added). Contrary to *Shutts,* the Supreme Court of Oklahoma considered the contacts with the State of Michigan, where DCC has its headquarters, as the most significant relationship with the claims of the proposed class as a whole, instead of considering the significant contacts of each member of the proposed class.

Further, the Oklahoma *Ysbrand* decision decides this important federal Due Process question in a way that conflicts with the decision in *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996). In *BMW,* this Court reversed and remanded an excessive punitive damages award against a manufacturer. This Court found that the award violated Due Process protections because, *inter alia,* the award was based at least in part on conduct that occurred in other states, the laws of which would not permit such an award. This Court stated:

> Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Id. at 572-73 (footnote omitted). Here, the effect of the Oklahoma *Ysbrand* decision, if upheld, will be to apply the law of Michigan, which Respondents contend permits "no injury" claims, to claims for conduct that is not actionable in other jurisdictions and that has no impact on Michigan or its residents.

The Oklahoma *Ysbrand* decision also decides this important federal Due Process question in a way that conflicts with the decision of at least one other state court of last resort, i.e., the Supreme Court of Texas. Texas courts, like those in Oklahoma, follow the "most significant relationship" test in determining what law should apply to a plaintiff's claims for breach of warranty. *See Henry Schein, Inc. v. Stromboe,* 102 S.W. 3d 675, 696 (Tex. 2002); *Bohannan v. Allstate Ins. Co.*, 1991 OK 64, ¶ 24, 820 P.2d 787, 795 (Okla. 1991). In *Schein,* the court noted that some members of the proposed class had agreements that provided that Texas law applied. The court found, however, that "class members who have not agreed to be bound by Texas law are not necessarily required to do so merely because Schein is in Texas." 102 S.W.3d at 696. The court further stated:

> Texas . . . does not apply the law of the state where a defendant is headquartered to every claim for economic damages that can be alleged against the defendant. The trial court's contrary conclusion was erroneous. The plaintiffs do not argue that a nationwide class should be certified if the trial court must look to the laws of all fifty states to adjudicate the claims. State and federal courts have overwhelmingly rejected class certification when multiple states' laws must be applied. For this reason, the plaintiffs have failed to show that legal issues predominate.

Id. at 698-99 (footnotes omitted).

In addition, many United States courts of appeals have also held that liability for alleged defects in nationally-marketed products cannot be determined by reference to only one state's law. Applying the choice-of-law regimes of

many different jurisdictions, many courts have concluded that such cases must implicate the law of *each and every* jurisdiction in which the challenged product was sold.

In reversing an order of class certification, the court in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002), noted that "the . . . conclusion that one state's law would apply to claims by consumers throughout the country . . . is a novelty." Further, in *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187; *amended and superseded on other ground, re'hg denied*, 273 F.3d 1266 (9th Cir. 2001), the court stated that "the district court correctly noted that '[p]laintiff does not show how application of California law satisfies constitutional due process requirements in this case.'" The court further noted that, "[o]n appeal, Zinser concedes that under *[Shutts]*, California law cannot be constitutionally applied to all putative class members." *Id.* In *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 312-315 (5th Cir. 2000), the court rejected the notion that the law of the state "where the product was manufactured and where it was placed in the stream of commerce" should control warranty claims in nationwide product defect class action. *See also, Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-675 (7th Cir.), *cert. denied*, 534 U.S. 951 (2001) (vacating certification of nationwide product defect class while observing that "few warranty cases ever have been certified as class actions – let alone as nationwide classes, with the additional choice-of-law problems that complicate such a venture."); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 618, (3d Cir. 1996), *aff'd, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (reversing certification of class and finding that differences in the plaintiffs' claims "when exponentially

magnified by choice of law considerations, eclipse any common issues in this case").

By determining that liability for alleged defects in nationally-marketed products may be determined by reference to only one state's law, without considering whether the application of that law would dilute a manufacturer's Due Process protections, the Supreme Court of Oklahoma has decided an important federal question in a way that conflicts with the decisions of several United States courts of appeals.

PROPOSITION THREE: THE OKLAHOMA *YSBRAND* DECISION, IF ALLOWED TO STAND, IS LIKELY TO AFFECT THE DECISIONS OF MANUFACTURERS.

Class action litigation tends to be filed in jurisdictions that are most hospitable to such actions. *See generally* Thomas M. Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform,* 75 N.Y.U. L. Rev. 507, 515 (May 2000). Certification under circumstances in which most other courts would not certify a class signals Oklahoma's willingness to become a favored destination for plaintiffs seeking a forum for nationwide class actions, and in particular, "no injury" class actions.

The flip side of attracting class action plaintiffs to Oklahoma courts is likely to be repelling manufacturing defendants from doing business in the State of Oklahoma – especially where manufacturers may be found liable in Oklahoma courts for conduct that is not related to Oklahoma and that would not be actionable in other jurisdictions. More than 80% of corporate attorneys interviewed

as part of a 2003 study agreed that perceptions about a state's liability system "could strongly influence whether a corporation would locate or do business in a state." *See* Oklahoma 21st Century, Inc., *State Policy and Economic Development in Oklahoma: 2004* (2004), *available at* http://www.okstatechamber.com/file_upload/OK21st2004.pdf at 70 (last visited April 30, 2004). Other studies similarly show that the perceived reasonableness of a state's legal framework is a factor that business decisionmakers consider when determining where to locate or do business. *See, e.g.,* Harris Interactive, Inc., *State Liability Systems Ranking Study,* 1, 7 (March 8, 2004), *available at* http://www.legalreformnow.com/pdfs/ILR%20Harris%20Poll.pdf (last visited May 11, 2004).

The certification of a class dramatically increases the stakes of litigation. Recent verdicts awarding astronomical damages (most of which are consumed by plaintiffs' attorney fees) have created an almost irresistible pressure to settle class action litigation, even where the claims are meritless. *See, e.g.,* Max Boot, *Federalist Society: Conference: Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Anymore? Day One: Panel One: Class Action Litigation: Introduction,* 41 N.Y. L. Sch. L. Rev. 337, 338 (1997), (stating that "certifying a class often puts a gun to defendants' heads and forces them to settle cases that are largely meritless"); *see also* David Minvielle, Comment, *Use of the Hearsay Objection in Class Certification Hearings to Promote Preliminary Evaluation on the Merits of the Case,* 45 Loy. L. Rev. 585, 597 (Fall 1999), (noting that "[c]ommentators almost universally agree that ' . . . class certification of mass torts forces settlements'"). Furthermore, the costs of defending against claims prior to certification or

settlement can be disastrous to businesses, especially those in their early years of development.

Allowing permissive certification of nationwide class actions, with the application of one State's law in violation of Due Process, could have a stifling effect on the decisions of manufacturers. Many businesses may avoid opening offices in Oklahoma or selling products to Oklahoma residents for fear that they will be found to be purposefully availing themselves of the privilege of doing business in Oklahoma. *See, e.g., Hanson v. Denckla*, 357 U.S. 235 (1958) (finding purposeful availment to be necessary to the constitutional exercise of jurisdiction by a state over a foreign corporation). Businesses would be justified in doing all within their power to minimize their contacts with Oklahoma to a level just below that which would give courts of Oklahoma general personal jurisdiction over them, so that they could not successfully be sued in the State of Oklahoma. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (holding that the business defendants' contacts with the state in which they were sued were not sufficient to permit the constitutional exercise of general personal jurisdiction over them); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (same). The Oklahoma Chamber requests that this Court consider these potential effects of Due Process violations inherent in the Oklahoma *Ysbrand* decision.

IV. CONCLUSION

For the reasons stated herein, The Oklahoma Chamber requests that this Court grant DCC's Petition for a Writ of Certiorari.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

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BRIEF OF *AMICUS CURIAE* THE MICHIGAN CHAMBER OF COMMERCE IN SUPPORT OF DAIMLERCHRYSLER CORPORATION'S PETITION FOR CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae The Michigan Chamber of Commerce ("The Michigan Chamber") represents the interests of thousands of businesses and professional associations in Michigan. Its purpose is to promote favorable economic conditions in Michigan. In order for those conditions to prevail, however, the laws of the State must be administered in a manner predictable to persons and businesses within it. The Judgment of the Oklahoma Supreme Court frustrates that purpose for the reasons explained below. The Michigan

Chamber therefore urges that this Court grant the petition for a writ of certiorari.[1]

REASONS FOR GRANTING THE WRIT

In an Judgment dated February 25, 2003, the Oklahoma Supreme Court affirmed the Sequoyah County District Court's certification of a nationwide class of plaintiffs, including plaintiffs in Michigan. The putative class thus includes claims brought by Michigan plaintiffs against a corporation with its principal place of business in Michigan, for conduct that occurred entirely within Michigan. According to the Oklahoma Supreme Court's holding, moreover, Michigan law is to govern all of the class members' claims. Thus, under that holding, the Sequoyah County District Court is to adjudicate claims brought by Michigan plaintiffs against a Michigan-based corporation, applying Michigan law. The Michigan Chamber respectfully requests that this Court issue a writ of certiorari, so that these claims may ultimately be adjudicated by Michigan Courts, not Oklahoma ones.

1. As defined by the Sequoyah County District Court, the putative class includes "entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia[.]" App. 24a-25a. The putative class thus includes Michigan residents. DaimlerChrysler has its principal place of business in Auburn Hills, Michigan. Moreover, in its February 25, 2003 opinion affirming the District Court in part, the Oklahoma Supreme Court held that Michigan law applies to all of the putative class members' claims. This case would therefore present the anomaly of Oklahoma Courts adjudicating claims brought by Michigan residents against a Michigan-based corporation, applying Michigan law.

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[1] Per the consent letters filed with this brief, all the parties have consented to the filing of the brief.

2. The Michigan Chamber respectfully submits that claims such as these—that is, claims brought by Michigan plaintiffs against a Michigan-based corporation and governed by Michigan law—should be adjudicated by Michigan Courts, not Oklahoma ones. These claims involve the purely intra-state affairs of the State of Michigan. There is no need for the Sequoyah County District Court to inject itself into their adjudication. To the contrary, Michigan Courts are plainly competent to handle them; indeed, that is why there are civil courts in Michigan.

a. Several concerns warrant specific mention in this regard. The first relates to the self-government of the people of the State of Michigan. Michigan's voters, through their elected representatives, have established and maintained a state judiciary whose structure and manner of selection is carefully delineated in Michigan's Constitution and statutes. *See Michigan Constitution* Art. 6; M.C.L.A. § 600.101 *et seq.* Among other things, Michigan law provides that its state judiciary shall include a Supreme Court, intermediate Courts of Appeal, and trial courts. *See Michigan Constitution* Art. 6; M.C.L.A. § 600.101 *et seq.* In addition, the Justices of the Supreme Court, and Judges of the lower courts, are accountable to the citizens of Michigan in nonpartisan elections held at the expiration of specified terms. *See Michigan Constitution* Art. 6; M.C.L.A. § 600.101 *et seq.*

Claims brought by Michigan residents against a Michigan-based corporation under Michigan law fall in the heartland of claims to be adjudicated by Michigan Courts. Under Michigan's Constitution and statutes, therefore, these claims are to be adjudicated by a state judiciary that in turn is accountable to the voters of Michigan.

This measure of democratic accountability is frustrated by the Judgment of the Oklahoma Supreme Court. Rather than have intrastate claims adjudicated by courts answerable to the voters of Michigan, the Judgment would have these claims

adjudicated by Oklahoma Courts, which are not. In a nation where self-government is a defining value, this concern is a serious one.

b. Second, and relatedly, the Judgment below runs contrary to principles of federalism. As the U.S. Supreme Court has observed, a State has no business regulating the internal affairs of another State. *See, e.g., BMW v. Gore,* 517 U.S. 559, 572 (1996) ("Alabama does not have the power . . . to punish conduct that was lawful where it occurred and that had no impact on Alabama or its residents"). The Seventh Circuit recently cited this very concern in reversing a certification order for a nationwide class in another automotive products-liability case. *See In re Bridgestone/Firestone, Inc.,* 288 F.3d 1012, 1020 (7th Cir. 2002) (nationwide class approach does "violence not only to Rule 23 but also to principles of federalism"), *cert. denied sub nom Gustafson v. Bridgestone/ Firestone, Inc.,* 537 U.S. 1105 (2003). Here, as shown above, the claims of Michigan class members involve only intrastate matters in Michigan. Respect for our federal system, therefore, dictates that these claims should be adjudicated in Michigan.

c. The Judgment below also creates practical concerns for Michigan residents and businesses. As an initial matter, if purely intrastate claims are now to be subject to the jurisdiction of courts like those in Sequoyah County, Michigan residents and businesses will face considerable uncertainty regarding the procedures by which their rights and interests will be adjudicated. The concern here lies not with the substantive law to be applied, but rather with the procedural rules that bind courts and litigants alike in adjudicating a particular claim. These rules can powerfully affect the course and outcome of litigation; and they include, for example, the rules governing class certification itself. The Michigan and Oklahoma rules governing class certification differ in material respects, *compare* 12 Okl. St. Ann. 2023(A), (B) *and*

M.C.R. 3.501, as do many other procedures directly or indirectly affecting parties' rights. If allowed to stand, therefore, the Judgment of the Oklahoma Supreme Court will create a new measure of uncertainty for Michigan residents and businesses concerning the procedures by which their rights will be adjudicated.

In summary, the citizens of the State of Michigan, through their elected representatives, have created a state judiciary answerable to them and having procedures of their own choosing. That judiciary was intended to adjudicate claims brought by Michigan residents against Michigan corporations under Michigan law. It is unwarranted and inappropriate for the courts of Oklahoma or any other State to frustrate this intention by injecting themselves into Michigan's intra-state affairs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF OF THE STATE OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE STATE OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the State of Michigan has a significant interest in the development and potential extraterritorial application of laws enacted by its legislature and therefore has a significant interest in the second question presented in the petition. Based on their own local experiences, the 50 State legislatures have enacted their own laws to determine what sort of corporate behavior should be regulated and how consumers should be protected. At the same time, the 50 State supreme courts and lower courts have developed their own common law doctrines to address many of these same issues. This has resulted in a diversity of policies reflecting the unique experiences and expectations of each State in the country.

This diversity of law-making preferences represents one of the hallmarks of American government and one of the country's unique contributions to government in general—a system of government in which the Congress may regulate matters of national import and the States may regulate matters of local import. The Oklahoma Supreme Court adopted a rule of law that upsets that salutary framework. It held that an Oklahoma trial court should interpret and apply the laws of Michigan to one million contract-based claims of potential class members around the Nation against petitioners. That choice encroaches upon protections extended not only to the parties but also the several States, and has grave constitutional implications under both the Commerce Clause and basic principles of federalism.

Michigan remains proud of the laws enacted by its legislature. Those laws are a model of consumer protection, and Michigan believes they properly balance the rights and responsibilities of businesses and consumers. But those laws are just one model, and Michigan is but one State in the Union. Basic notions of comity and State sovereignty, articulated in numerous provisions of the United States Constitution, compel the conclusion that the courts of one State should not purport to override the local laws of all other States by applying that State's—or some other State's—laws to millions of separate transactions against a particular defendant in a single lawsuit. Accordingly, the State of Michigan respectfully submits this brief *amicus curiae* in support of Petitioners.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly recognized "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer*

Institute, 491 U.S. 324, 335-36 (1989) (footnotes omitted). The latter interest is the one the amici assert here; and that interest, the amici respectfully submit, is infringed by the judgment of the Supreme Court of Oklahoma in this case.

A. The Oklahoma Court's Judgment Conflicts With Basic Principles Of Federalism

1. This Court recently noted that "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mutual Auto Insurance Co. v. Campbell,* 538 U.S. 408, 422 (2003). The converse is that no State may "impose its own policy choice on neighboring States." *BMW of North America v. Gore,* 517 U.S. 559, 571 (1996). Thus it is settled that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court,* 104 U.S. 592, 594 (1881); *see also New York Life Insurance Company v. Head,* 234 U.S. 149, 161 (1914) (recognizing "the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends"); *Bigelow v. Virginia,* 421 U.S. 809, 824 (1975) ("Virginia possessed no authority to regulate the services provided in New York").

The several States have in fact exercised their prerogative to make "reasoned judgment[s]," *Campbell,* 538 U.S. at 422, with respect to the very types of claims asserted here. As noted in the Petition, different States have adopted different rules with respect to, *inter alia,* the viability of "no injury" claims, the vertical privity requirement for warranty claims, and whether purchasers of used vehicles may assert implied warranty claims. *See* Petition at 22; *cf. Gore,* 517 U.S. at 570

(acknowledging "a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States").

2. The judgment of the Oklahoma Supreme Court would negate these diverse policy choices by applying the law of one State to transactions that occurred in all 50. For example, the claims of a California class member, with respect to a vehicle that was advertised, purchased, and driven there, would be governed by the policy choices of Michigan law-makers, rather than the different choices of California ones. Thus, the result dictated by the Oklahoma Court disregards rather than "respect[s] the interests of other States[.]" *Id.* at 571.

The reasoning of the Oklahoma Court lays bare the Court's failure to grasp these principles. The Court asserted that "the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions." App. 14a. That litigation in different States might yield different results, of course, is indisputable; indeed, the very definition of a product defect often differs from State to State. *Compare, e.g., Delaney v. Deere and Co.*, 999 P.2d 930, 944 (Kan. 2000) (applying "consumer expectations" test for determining product defect); *Beacon Bowl Inc. v. Wisconsin Electric Power Company,* 501 N.W.2d 788, 792 (Wis. 1993) (same), *with Sperry-New Holland v. Prestage,* 617 So.2d 248, 256 (Miss. 1993) (applying "risk-utility" test); *Denny v. Ford Motor Co.,* 662 N.E.2d 730, 735-38 (N.Y. 1995) (same).

But those differences are hardly a problem to be remedied by a nationwide class action governed by the law of a single State; rather, they are a reflection of the federal design. "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone, Inc.,* 288

F.3d 1012, 1020 (7th Cir. 2002), *cert. denied sub nom Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003). The Oklahoma Court overlooked this basic principle of federalism in holding to the contrary.

B. The Oklahoma Court's Judgment Conflicts With The Commerce Clause

1. As interpreted by this Court, "the 'Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State[.]'" *Healy*, 491 U.S. at 336 (ellipses omitted) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion)). Hence the Clause does not merely restrict State power, by proscribing "state-imposed limitations on interstate commerce[.]" *Healy*, 491 U.S. at 336. Instead, the Clause also *protects* "the autonomy of the individual States within their respective spheres[,]" *id.*, by proscribing interference by one State with another's purely intrastate affairs. This was a point lost on the Court below.

2. The judgment of the Oklahoma Court effects precisely the sort of extraterritorial interference forbidden by the Commerce Clause. As an initial matter, the Court's application of the law of a single State of its choosing to the claims of class members nationwide constitutes regulation of the transactions giving rise to those claims. For "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Gore*, 517 U.S. at 559 n.17; *see also New York Times Co v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief"). The

Oklahoma Court's decision to apply the law of a single State to transactions nationwide, therefore, constitutes regulation of those transactions as much as would an Oklahoma statute purporting to have the same jurisdictional sweep.

The Michigan Legislature's intent, even if it could be ascertained, concerning the extraterritorial application of its law is immaterial to the Commerce Clause analysis. State regulation of "commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy,* 491 U.S. at 336. Instead, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.*

The judgment of the Oklahoma Court plainly has that effect here. By the exercise of Oklahoma State power, the judgment would apply the substantive law of the *Oklahoma* Court's choosing to transactions occurring entirely outside Oklahoma's borders, thereby frustrating the policy judgments of lawmakers in other States. The judgment thus intrudes upon the autonomy afforded other States by the Commerce Clause.

In summary, Chief Justice Marshall observed that "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass." *McCulloch v. Maryland,* 4 Wheat 316, 403 (1819). The Oklahoma Supreme Court has done precisely that with respect to the claims at issue here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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INTEREST OF THE AMICI[1]

The Chamber of Commerce of the United States of America is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector, and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Alliance of Automobile Manufacturers, Inc. is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. Petitioner DaimlerChrysler is a member of the Alliance, along with eight other major auto manufacturers operating in North America.

Amici's members are subjected to abusive class actions in state courts on a regular basis. They accordingly have a strong interest in ensuring both that the constitutional limitations on a court's choice of law apply with full force in the class action context and that the class action does not become a means for undermining state sovereignty in derogation of the Commerce Clause and traditional principles of federalism.

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[1] This brief was not authored in whole or in part by counsel for any party in this case, and no one other than amici, their members, or their counsel made any monetary contribution to its preparation or submission. S. Ct. R. 37.6. The parties have consented to the filing of this brief; their letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT

No legal issue is of greater concern to the U.S. business community than the abuse of the class action device. Over the last decade, courts in certain jurisdictions—including Alabama, Illinois, and now Oklahoma—have developed a reputation for their willingness to certify nearly any class, even when the class is asserting claims that elsewhere would require highly individualized litigation. Courts in these jurisdictions have arrogated tremendous power over the business activities of corporations in all 50 States.

The decision of the Oklahoma Supreme Court in this case is part of a disturbing trend in class actions—the distortion of choice-of-law rules in order to facilitate the certification of the broadest class possible. Implicitly recognizing that it would be impracticable to try a class action under the laws of the 50 States and the District of Columbia, the Oklahoma Supreme Court turned choice-of-law analysis on its head—presupposing that it would be permissible (and indeed desirable) to subject all the claims to the law of a single State. The court then concluded that of all the States, Michigan had the most significant relationship to "the parties and this litigation." Pet. App. 13a.

As the petition persuasively argues, this result-oriented approach is in direct conflict with several of this Court's decisions, including *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), and *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930), as well as with the decisions of other state courts and the federal courts of appeal. The Constitution's due process guarantee prohibits a court from adjudicating a party's substantive rights based upon the law of a State that lacks sufficient connection to the transaction underlying the claim. Whether in a class action or in an individual lawsuit, the court must conduct an individualized analysis with regard to each claim in order to determine whether due process permits the application of a particular State's law.

The Oklahoma Supreme Court's approach to class litigation also does great violence to the principles of federalism and state sovereignty. This Court has made clear that a State may not regulate conduct outside its own territory without the consent of Congress. *E.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 421-22 (2003); *Healy* v. *Beer Inst.*, 491 U.S. 324 (1989). The Oklahoma Supreme Court's ruling entirely eviscerates that principle. If the law of the defendant's home State can be applied in a class action regardless of where the underlying transaction took place, then States will lose the ability to regulate the conduct of out-of-state corporations within their own boundaries.

The petition demonstrates why review is warranted, given the conflict of authority regarding the propriety of applying the law of a defendant's domicile to the claims of a nationwide class, and the inconsistency between the decision below and previous decisions of this Court. Accordingly, we will not burden the Court with additional analysis of the case law. Instead, this brief addresses the pervasiveness of class action abuse, the disruptive effect that the Oklahoma Supreme Court's approach to class action litigation would have on state sovereignty and on commerce nationwide, and the importance of this Court's intervention without awaiting a final judgment on the merits that likely will never eventuate.

ARGUMENT

I. The Last Decade Has Seen An Explosion In Nationwide Class Action Litigation, Even With Regard To Highly Individualized State-Law Claims.

Class action litigation has exploded over the last fifteen years. According to one study, from 1994 to 1997, U.S. companies experienced a growth rate in the number of putative class actions filed against them ranging from 300% to 1000%. 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at ix-x

(May 1, 1997); see also Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 184 (2001) (RAND analysts concluded that class action lawsuits likely surged during the 1990s, with about half of class action litigation activity taking place in state court).[2]

Yet the dramatic growth in class litigation should not be misread as a sign that the rights of more individuals are being vindicated. The modern class action is often a lawyer-initiated, lawyer-directed affair designed to generate a substantial fee award.[3] To that end, prospective class counsel regularly scan

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[2] Another recent survey found that between 1988 and 1998, class actions in federal court increased by 338%, and state court class actions were up by 1042%. *Class Action Litigation: A Federalist Society Survey*, 1 CLASS ACTION WATCH 1, 3 (Issue 1 1999); see also *Hearing on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm.*, 105th Cong. (Mar. 5, 1998) ("1998 Class Action Hearings") (statement of John W. Martin, Jr.). See generally DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS 62-68 (RAND 2000) (discussing evidence indicating an increase in number and diversity of class actions in the late 1990s).

[3] A Federal Judicial Center study of class actions found that, in three of the four districts studied, the mean fee award in class actions that settled after certification and that paid some money to class members was in excess of $1 million. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES fig. 69 (1996), reprinted in 10 NEWBERG ON CLASS ACTIONS 181, 395 (4th ed. 2002) (mean in one of those districts was over $2.5 million, and mean in fourth district was $732,537). And the awards frequently bear no relationship to the relief garnered by the class. Among the most extreme examples is the fee award in a recent Madison County, Illinois case against AT&T and Lucent Technologies, in which the putative class alleged that the defendants had overcharged for rented telephones. After settlement, class members claimed $8.4 million

news reports for possible bases for class litigation, seek out individuals to serve as named plaintiffs, and then shop for friendly courts in which to file suit. They then obtain class certification—often, as here, without showing that litigation on a class-wide basis is consistent with the constitutional rights of the defendant and absent class members—and then use the threat of a huge verdict to force a settlement that provides a large fee for class counsel.[4]

The most effective way for a class action lawyer to ensure a lucrative settlement is to allege and certify a *nationwide* class, thus maximizing the coercive value of the certification order. See *infra* at 17-20. As the federal courts have recognized, however, nationwide class actions raising claims under state law generally may not be certified consistent with the requirements of Rule 23, due process, and federalism because of complexity resulting from the need to apply the varying laws of the 50 States. *See, e.g.*, *Andrews* v. *American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano* v. *American Tobacco*

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collectively from the settlement fund, whereas class lawyers took home more than $84.5 million in fees and expenses. See Trisha Howard, *Lawyers Profit Most in Suit, Defendant Says*, ST. LOUIS POST-DISPATCH, Mar. 31, 2004, at A1 (settlement agreement also required defendant AT&T to provide $50 million in free calling cards to charity). See also, *e.g.*, *MassMutual Class-Action Settlement Withdrawn*, BEST'S INSURANCE NEWS, Feb. 27, 2001 (discussing New Mexico class-action settlement, which would have given almost $8 million in fees to class counsel and $350,000 to the two named plaintiffs but no monetary relief to the more than six million absent class members); Thomas J. Cole, *Attorney Backs Out Of Insurance Settlement*, ALBUQUERQUE J., Feb. 23, 2001, at A1 (describing another case in which the same class counsel shared in a $7 million fee award, while the two named plaintiffs received $30,000 each and three million putative class members received no monetary award).

[4] See 1998 Class Action Hearings (testimony of former Attorney General Dick Thornburgh, Mar. 5, 1998) (discussing examples).

Co., 84 F.3d 734 (5th Cir. 1996); *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), aff'd *sub nom. Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997); *In re Am. Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

Seeking a more hospitable forum, many class action lawyers have shifted their attention to state court. JOHN H. BEISNER & JESSICA DAVIDSON MILLER, CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES 3 (Manhattan Inst. July 2002) (www.manhattan-institute.org/html/cjr_5.htm); see also Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (certification of nationwide classes by state courts "has been increasing in recent years"); *The Interstate Class Action Jurisdiction Act of 1999: Hearing Before the House Judiciary Comm.*, 106th Cong. (July 21, 1999) (statement of former acting Solicitor General Walter E. Dellinger); *cf.* Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) ("It is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in the state courts"); *Class Action Litigation: A Federalist Society Survey*, *supra*, at 1, 3 (between 1988 and 1998, state-court class actions were up by *1042%*, compared with 338% in federal court).

Moreover, class action attorneys are not using just any state court in their effort to circumvent the constitutional limitations on class actions. With increasing frequency, they are filing their cases in state courts that have acquired a reputation for acquiescing in requests for nationwide certification and running roughshod over the constitutional rights of defendants and absent class members.

For example, after a few class-friendly decisions in Alabama, class action lawyers from across the country flocked to that State to file class actions. In 1995-1997, courts in six

thinly populated Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes. STATESIDE ASSOCIATES, CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY IN ALABAMA (1998) (attached to statement of Dr. John B. Hendricks, on behalf of Small Business Council of the U.S. Chamber of Commerce, before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee (Mar. 5, 1998)).[5] The Alabama Supreme Court finally intervened, making clear that, under that State's procedural rules, trial courts were required to perform a rigorous analysis of factual issues, choice-of-law issues, and other requirements for class certification.[6] As a result, class action filings in Alabama have slowed dramatically. See Eddie Curran, *Welcome to Greene County, America's Class Action Capital*, MOBILE REGISTER, Dec. 26, 1999, at 1B.

But the intervention of the Alabama Supreme Court has served only to cause class action lawyers to take their show on the road to such class-action/mass-joinder havens as

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[5] On at least one occasion, the Alabama courts certified a nationwide class identical to one that a federal court refused to certify on constitutional grounds. Compare, *e.g.*, Order Certifying Plaintiff Class at 8, *Naef* v. *Masonite Corp.*, No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995), reprinted in *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1086 (Ala. 1996) (approving plan to try 50-state consumer fraud class action), with *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig*, 170 F.R.D. 417, 422, 425, 427 (E.D. La. 1997) (denying certification of identical class because, among other things, the suit would involve applying 50 different legal standards, and *Naef*'s effort to synthesize those standards into an "Esperanto" amalgamation that did not represent the legal standard of any State inadequately protected defendants' constitutional rights).

[6] See, *e.g.*, *Ex parte Green Tree Fin. Co.*, 723 So. 2d 6, 9 (Ala. 1998); *Ex parte Household Retail Servs., Inc.*, 744 So. 2d 871, 878-79 (Ala. 1999); *Mann* v. *GTE Mobilnet, Inc.*, 730 So. 2d 150, 152 (Ala. 1999).

Mississippi, West Virginia, Washington, New Mexico, and southern Illinois.[7] To date, few state appellate courts have interceded to ensure that class action litigation within their jurisdictions is conducted in a manner consistent with the Constitution.

Indeed, appellate courts in Illinois have affirmed the certification of multistate class actions based upon the conclusion that Illinois law governs all claims against an Illinois corporation, regardless of where those claims arose. *E.g.*, *Clark* v. *TAP Pharm. Prods.*, 798 N.E.2d 123, 129 (Ill. App. Ct. 2003) (upholding application of Illinois law to transactions outside Illinois that involved non-Illinois class members and medical care providers, based solely on fact that defendant's corporate headquarters is in Illinois); *Avery* v. *State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254-55 (Ill. App. Ct. 2001) (in case involving auto insurance claims, applying law of defendant's domicile to claims arising elsewhere), appeal granted, 786 N.E.2d 180 (Ill. 2002). The class action bar is well aware of this trend and has responded accordingly. Madison County, Illinois is now ranked third nationwide in class action filings each year behind the far more populous counties containing Los Angeles and Chicago. Beisner & Miller, 25 HARV. J.L. & PUB. POL'Y at 159. Approximately 81% of the putative class actions filed in Madison County between February 1998 and March 2001 sought to certify nationwide classes. *Id.* at 169; see also Tom McCann, *Class Actions: The Battle Heats Up*, CHICAGO LAW., Apr. 2004, at 8, 9 (106 class actions were filed in Madison County in 2003, as compared with 11 filings in 1999); Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 30, 2001, at

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[7] See, *e.g.*, John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court,* 25 HARV. J.L. & PUB. POL'Y 143, 159 (2001) (discussing increase in nationwide class actions in various states).

A1 (describing similar phenomenon for mass-joinder suits in Mississippi).

The courts of Minnesota have taken the same approach. In *Peterson* v. *BASF Corp.*, a nationwide class of farmers asserted claims under the New Jersey Consumer Fraud Act with regard to BASF's marketing of two herbicide products. See 618 N.W.2d 821, 822 (Minn. Ct. App. 2000). Although BASF is headquartered in New Jersey, neither the products themselves nor the marketing materials were developed in that State. Nevertheless, the trial court certified a nationwide class and allowed it to pursue claims under New Jersey law. The court of appeals affirmed the certification in an opinion that did not even consider BASF's arguments with regard to choice of law. See *id.* at 825-26. A $52 million judgment was ultimately awarded against BASF. See 657 N.W.2d 853 (Minn. Ct. App. 2003).

In the post-trial appeal, the appellate court and the Minnesota Supreme Court both invoked ill-founded procedural theories in order to avoid reaching the question whether the Constitution would permit the application of New Jersey law to claims that arose elsewhere.[8] Indeed, the only substantive discussion of the choice-of-law issue by any court in *Peterson* is in a concurrence by one appellate court judge, who observed:

> [A]t the end of the day, this dispute is the poster child for national class action reform. We have here a Minnesota district court, applying a New Jersey

[8] See 657 N.W.2d at 875 (court of appeals: BASF could not appeal application of New Jersey law after final judgment because court's previous decision affirming class certification, which did not mention choice of law, nevertheless constituted "law of the case" on that issue); 675 N.W.2d 57, 67-68 (Minn. 2004) (supreme court: BASF "waived" supreme court review on choice of law by failing to seek discretionary review of the issue following the appellate court's interlocutory decision affirming class certification).

> consumer fraud statute to a nationwide class of plaintiffs, with few of those plaintiffs residing in New Jersey. And it is probably a fair assumption that the legislative authors of the New Jersey consumer protection scheme did not have in mind midwestern farmers purchasing agricultural chemicals as the protected class. * * *
>
> This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures.

657 N.W.2d at 875 (Anderson, J., concurring specially). Unfortunately, these sentiments did not persuade the Minnesota courts to take action themselves to correct the problem.

Courts in other States also have certified nationwide or multistate class actions based upon the law of a single State without paying the slightest attention to the due process and sovereignty concerns implicated by such an approach. For example, a Washington court certified a 27-state class action seeking "inherent diminished value" ("IDV") damages under the putative class members' automobile insurance policies, on the theory that the laws of the various States did not materially differ. *Busani* v. *United Servs. Auto. Ass'n*, No. 99-2-08217-1, Class Certification Order (Pierce County Super. Ct. May 11, 2001). In so holding, the court ignored the fact that many jurisdictions had never addressed whether IDV damages were cognizable and others had expressly held that they are not. See, *e.g., Johnson* v. *State Farm Mut. Auto. Ins. Co.*, 754 P.2d 330, 331 (Ariz. Ct. App. 1988) (denying IDV claim); *Ray* v. *Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 1415-17 (1988) (same). In a different insurance case, a New Mexico trial court certified a nationwide class of MassMutual policyholders and proceeded to apply New Mexico law, with no choice-of-law

analysis at all. *Wilson* v. *Massachusetts Mut. Life Ins. Co.*, No. D-0101-CV-98-02814 (1st Jud. Dist. Ct. Santa Fe County Nov. 16, 1999) (orders certifying class and awarding partial summary judgment in favor of lead plaintiff).[9]

In the instant case, Oklahoma has joined the ranks of States that are willing to set aside the U.S. Constitution in order to foster class-based litigation. To avoid the manageability problems that would inevitably result from litigating this case under 50 different legal standards, the Oklahoma Supreme Court analyzed the claims collectively and applied the law of the only State that *all* the claims had in common—the defendant's home State—regardless of whether Michigan had any relevant contacts to the underlying transactions. Pet. App. 13a (applying Michigan law because Michigan had a "more significant" relationship "to the parties and this litigation" than any other State). This analysis flies in the face of this Court's directive to assess—for each individual claim—the constitutionality of applying a particular State's law. *Shutts*, 472 U.S. at 818, 821-22 (the governing State "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, 'contacts creating state interests,' in order to ensure that the choice of [that State's] law is not arbitrary or unfair") (quoting *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)).[10]

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[9] See also *Wershba* v. *Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 159-60 (Ct. App. 2001) (affirming certification and settlement of nationwide class action under California's consumer protection laws).

[10] There can be no serious doubt that, in an individual breach-of-warranty suit filed by an Oklahoma resident against the petitioner, Oklahoma courts would apply Oklahoma law, not Michigan law. See Pet. App. 11a-13a (citing *Collins Radio Co.* v. *Bell*, 623 P.2d 1039, 1047 (Okla. Ct. Civ. App. 1980), and *Bohannan* v. *Allstate Ins. Co.*, 820 P.2d 787, 795 (Okla. 1991)). It should thus be self-evident that

As discussed in more detail below, the disruptive effect of nationwide class action litigation on U.S. commerce cannot be overstated. Any State that shows a willingness to set aside constitutional limitations in order to certify a class will necessarily attract far more than its share of nationwide class litigation. Like Illinois, Oklahoma will undoubtedly draw lawyers from across the nation who are attempting to certify nationwide classes. Through the nationwide class action, a few class-friendly state courts can effectively hijack significant portions of the U.S. economy. As Judge Easterbrook has explained, even if only 10% of judges would be receptive to a nationwide class action, one such judge "is bound to turn up if plaintiffs file enough suits—and, if one nationwide class *is* certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives." *In re Bridgestone/Firestone Inc.*, 333 F.3d 763, 766-67 (7th Cir. 2003). This Court's intervention is desperately needed to ensure that constitutional limitations on choice of law are applied with equal force in the class action context and thereby prevent the abuse that is now rampant in the state courts.

II. The Distorted Choice-Of-Law Analysis In This Case Undermines State Sovereignty, Principles Of Federalism, And Commerce Across The Nation.

The choice-of-law analysis in this case threatens to work a radical change in the legal foundation on which U.S. commerce proceeds. For more than two hundred years, the several States have regulated the conduct of business within their respective borders. Only Congress has the power to encroach on a State's

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the Oklahoma Supreme Court used the procedural device of the class action to alter the substantive law with regard to many class members' claims. That alone should be sufficient reason to doubt the validity of the state courts' insistence on applying Michigan law nationwide.

sovereignty by imposing a system of uniform national regulation on interstate commerce. U.S. CONST. art. I, § 8, cl. 3. In this case, however, the state courts of Oklahoma have usurped that role, imposing the law of a single State upon the conduct of the defendant in all States solely for the convenience of the lawyers who filed the case.

The U.S. Constitution contemplates that each of the 50 States is a sovereign of "equal dignity" with a distinct sphere of authority. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). Accordingly, this Court consistently has rejected States' efforts to apply local law to transactions that occurred entirely in other States. *See, e.g.*, *Campbell*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568-73 (1996) (Alabama jury could not apply Alabama law to punish defendant for transactions taking place in other States); *Healy*, 491 U.S. at 336 (Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders"); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (rejecting New York's attempt to "project its legislation" into other States); *Shutts*, 472 U.S. at 818-23 (Kansas court could not apply forum law to claims of class members with no connection to Kansas); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois); *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins.*

Co. v. *Head*, 234 U.S. 149, 161 (1914) ("it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends"); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction").

The theory adopted by the Oklahoma Supreme Court is flatly inconsistent with the system of state sovereignty and federalism contemplated by the Constitution. Through common law and legislation, each of the 50 States is free to develop its own standards for regulating business, based upon its own assessment of the relevant policy interests. But if choice of law in a nationwide class action may depend upon where the defendant maintains its headquarters—rather than, for example, where the product at issue is sold or delivered (see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 & cmts. e, f (1971))—then each State necessarily loses the ability to apply the standard of its choosing to business conduct within its own borders. Thus, in this case, because of a state court decision in Oklahoma, the law of Alabama will not govern the breach of warranty claims of a class member who resides in Alabama and who purchased a vehicle in Alabama from an Alabama dealership for use in Alabama.[11]

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[11] The Alabama Supreme Court, for example, has definitively rejected causes of action based on the risk of future injury, like the cause of action at issue here. See *Ford Motor Co.* v. *Rice*, 726 So. 2d 626, 631 (Ala. 1998). Under the Oklahoma Supreme Court's approach, an Alabama plaintiff—whose claims would clearly be barred in an individual lawsuit—may have the opportunity to persuade the court to accept her claims under a different State's law, simply because they are part of a case certified as a class action.

The absurdity of this approach is heightened in this case, in which a State with no real interest in regulating its citizens' extraterritorial conduct was foisted into doing so by another State's courts. Here, it was the state courts of *Oklahoma* that decided to apply Michigan law to transactions that occurred beyond Michigan's borders—over the objection of the State of Michigan itself. See Pet. 6-7 (discussing amicus brief filed by State of Michigan in support of DaimlerChrysler's petition for rehearing). In this respect, too, the plaintiffs' theory undermines the sovereignty of each State.

This result is potentially harmful, not only to businesses operating nationwide, but also to absent class members who may see their substantive rights sacrificed in order to ensure certification of the broadest class possible. If the defendant maintains its headquarters in Washington, for example, which permits punitive damages only when authorized by statute,[12] class members from more permissive States may be prejudiced by the application of Washington law. In such a case, the burden would be on the absent class member to be aware of the legal issue and to opt out of the class in order to avail herself of the legal protections afforded her by her own State's law.

The practice of applying the law of the defendant's domicile in order to facilitate nationwide class litigation also has the deleterious effect of concentrating tremendous regulatory power in the courts of a few class-friendly jurisdictions around the country. In Madison County, Illinois, for example, plaintiffs' lawyers often file cookie-cutter lawsuits against many different defendants in the same industry. Of the 43 class action suits filed in Madison County in 2001, 25 proposed nationwide or multistate classes challenging common

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[12] *E.g., Dailey* v. *North Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996); *Spokane Truck & Dray Co.* v. *Hoefer*, 25 P. 1072 (Wash. 1891).

practices allegedly used by many different corporations in the financial services or insurance industries. BEISNER & MILLER, *supra*, at 4-6 (discussing, for example, lawsuits against Allstate, AIG, Prudential, Country Mutual, Progressive, Farmers, St. Paul Fire and Marine, CGU, Hartford, Geico, and Shelter Insurance, all challenging the same practice).[13] Using the theory adopted by the Oklahoma Supreme Court, the Madison County courts could certify nationwide or multistate class actions in each of these cases under the law of the defendant's home State. Thus, the Madison County courts would be in a position to regulate an entire industry nationwide—a power ordinarily reserved for Congress under the Commerce Clause.

The prohibition on the extraterritorial application of state law is not just a matter of constitutional law; it is also a practical necessity. Under the approach adopted by the Oklahoma courts, two companies that compete directly against one another for business in a particular region would find themselves operating under different legal standards if they maintain their respective headquarters in different States. For example, the advertising of packaged baked goods in Idaho might be governed by the law of Illinois (for the Illinois-based Sara Lee), as well as the law of Connecticut or New Jersey (for Pepperidge Farm, which is a Connecticut subsidiary of a New Jersey company). The two companies, meanwhile, would need to structure their business operations in Idaho based upon both

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[13] See also *Bunting* v. *Progressive Corp.*, 2004 WL 936552 (Ill. App. Ct. Apr. 30, 2004) (non-Illinois member of multistate class alleging that insurance company and its valuation vendor systematically undervalued vehicles declared to be a total loss could state claim against defendant/vendor under Illinois consumer fraud statute because Illinois is where defendant/vendor maintained its principal office and presumably created its allegedly deceptive policy of undervaluing automobiles).

Idaho law and the law of their respective home States, even though the relevant legal standards may be in conflict.

This is no way to run an economy. The orderly process of commerce depends upon uniform expectations. States need the authority to regulate local markets, and companies need to be able to predict with reasonable certainty which law will govern their conduct in a particular State. If, with respect to a particular industry, Congress determines that nationwide standards are necessary, then it may choose to take action. Until then, principles of federalism and state sovereignty require that each State have the ability to achieve local uniformity through the application of its own laws. This system cannot tolerate the application of one State's law beyond its borders in nationwide class actions.

III. The Coercive Nature Of Class Action Litigation And The High Likelihood Of Settlement Make Review At This Stage Of Litigation Essential.

The procedural posture of this case—after class certification and before a trial on the merits—is not a bar to this Court's consideration of the choice-of-law issue. As the petition explains, the decision below resolved the important constitutional question now before the Court and is a final judgment for purposes of 28 U.S.C. § 1257(a). Pet. 26-30 (discussing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)). Indeed, to wait for a case that presents a similar issue following entry of final judgment on the merits would be unrealistic, because defendants who face the prospect of litigating a case certified as a nationwide class action often have no choice but to settle long before the case goes to trial.

In any nationwide class action, a class certification order hangs like a Damoclean sword over the defendant, often forcing it into an unwarranted settlement and a coerced relinquishment of its right to trial. As the Fifth Circuit has explained:

> [C]ertification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

Castano, 84 F.3d at 746 (citations omitted). Accordingly, the certification of a large class "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); see also *Castano,* 84 F.3d at 746 ("certification creates insurmountable pressure on defendants to settle" because of "[t]he risk of facing an all-or-nothing verdict * * * even when the probability of an adverse judgment is low"); *Parker* v. *Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002); *Newton* v. *Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *cf.* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254 (2002) ("Loose certification standards risk high costs by inviting frivolous class action suits that defendants settle rather than face potentially crippling, even bankrupting, damage awards").

As a result of these pressures, "the vast majority of certified class actions settle." Bone & Evans, *supra*, at 1291. A 1995 study conducted by the Federal Judicial Center found that for the four federal district courts studied, the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%. WILLGING ET AL., *supra*, tbl. 40, reprinted in 10 NEWBERG at 437. And this study did not include either mass tort class actions—which are "one of the most settlement-prone areas of class action litigation"—or class actions filed only for settlement purposes under Rule 23(e). Bone & Evans,

supra, at 1292 n.148; see also George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 522 (1997) (observing that "virtually every mass tort class action that has been successfully certified has settled out of court rather than been litigated to judgment"). Other studies have produced similar results. *E.g.*, Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501 (1987) (reporting settlement rate of more than 78% for certified and consolidated class actions based upon sample from the Northern District of California). Moreover, even if a certified class action is litigated to final judgment, an improper *grant* of certification—such as the one here—will still evade review if the defendant is able to prevail on the merits.

For obvious reasons, the settlement pressure in a case involving a *nationwide* class is even greater, given the stakes. A nationwide class action can threaten even the largest U.S. corporations with enormous business disruption, staggering damages, and even bankruptcy. If, not wanting to "roll the[] dice," the defendant decides to settle the suit, "the class certification—the ruling that will have forced them to settle—will never be reviewed." *Rhone-Poulenc*, 51 F.3d at 1298. By definition, the important choice-of-law issue presented here will arise only when a nationwide class is certified by a class-friendly court. In such a case, it is particularly unlikely that the Court would have an opportunity to review the issue after final judgment on the merits.

This Court recognized the importance of immediate review of class certifications when it submitted to Congress the amendment to Fed. R. Civ. P. 23 that gives the federal courts of appeals discretion to hear appeals from the grant or denial of class certifications without applying either the requirements of 28 U.S.C. § 1292(b) or the exacting standards for a writ of mandamus. The Advisory Committee Note accompanying the

new rule specifically recognizes that a discretionary power of interlocutory review of class certifications is desirable because "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) 1998 Adv. Comm. Notes. Similarly, the 1997 Report of the Judicial Conference's Committee on Rules of Practice and Procedure recommending approval of Rule 23(f) opined that "the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice" because "[a] certification decision is often decisive as a practical matter." Whereas the denial of certification can put an end to an action seeking to vindicate large numbers of small claims, "certification can exert enormous pressure to settle."

For the same reasons, this Court can and should grant certiorari to review important constitutional issues relating to class litigation at the certification stage, rather than deferring review until final judgment on the merits—a time that, for the vast majority of cases, will never come. See *Cox Broadcasting*, 420 U.S. at 482-83 (review of interlocutory state court decision resolving an issue of federal law is appropriate when "the federal issue has been finally decided in the state courts," the party seeking review "might prevail on the merits on non-federal grounds" and render Supreme Court review of the federal issue unnecessary, and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action").

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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